Nos. 90-1205, 90-6688

(23)

Supreme Court, U.S.
FILED
AUG 9 1991
OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,

Petitioner

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, *ET AL.*,

Respondents.

JAKE AYERS, SR., *ET AL.*,

Petitioners

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Motion For Leave To File Brief Amici Curiae And Brief Amici Curiae Of Charles E. "Buddy" Roemer, III, Governor Of The State Of Louisiana, Board Of Regents Of The State Of Louisiana, And Board Of Supervisors Of Louisiana State University And Agricultural And Mechanical College In Support Of Respondents

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Governor Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, the Board of Regents of the State of Louisiana, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (hereinafter "Movants") respectfully move for leave to file the attached brief amici curiae in support of the respondents. The Solicitor General of the United States and counsel for the respondents have consented to the filing of the attached brief. Counsel for the private petitioners have refused to consent to the filing of the brief.

The State of Louisiana and its higher education boards are engaged in litigation with the United States which also seeks judicial determination of the standard applicable to desegregation of higher education. *United States v. Louisiana*, 427 F. Supp. 509 (E.D. La. 1981); 692 F. Supp. 642 (E.D. La. 1988); 718 F. Supp. 499, 521, 525 (E.D. La. 1989); 751 F. Supp. 606 (E.D. La. 1990). The Louisiana case is presently pending before the United States Court of Appeals for the Fifth Circuit in consolidated case number 90-3874, consideration of which has been stayed pending the disposition before this Court of *Ayers v. Allain*, 914 F.2d 676 (5th Cir 1990) (en banc), *cert. granted sub nom. Ayers v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991) (consolidated with *United States v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991)).

The Louisiana litigation addresses issues of law substantially similar to those presently at bar. Additionally, under a negotiated Consent Decree, Louisiana gained valuable experience, at great cost, in what steps are unreasonable, impractical and educationally unsound in attempting to achieve greater racial mixture of Louisiana's predominantly black institutions. Movants submit that knowledge of this experience will prove helpful to the Court in determining the appropriate standard of liability. Furthermore, Movants have access to information, not heretofore presented to the Court, concerning the development of the criteria issued by the former Department of Health, Education and Welfare ("HEW") discussed at length in the Brief *Amici Curiae* of Joseph A. Califano, Jr., Mary F. Berry, Ernest L. Boyer and David Tatel at 1-14, the Brief of the NAACP Legal Defense and Educational Fund, Inc., American Civil Liberties Union, and the National Conference of Black Lawyers as *Amici Curiae* in Support of Petitioners at 27-34, and the Brief of Petitioners at 48-51, 69-70.

For the foregoing reasons, Movants submit that the attached brief provides an important perspective on relevant issues that differs from that of the parties. Movants respectfully request that their motion for leave to file a brief as amici curiae be granted.

Respectfully submitted,

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STATEMENT OF INTEREST

The State of Louisiana and its higher education boards[1] have been engaged in long-standing litigation with the United States (the

[1] The current four boards which direct public higher education in Louisiana are the Board of Regents ("Regents"), which has responsibility for the coordination of academic program development and the presentation of a unified budget to the State Legislature; the Board of Trustees for State Colleges and Universities ("Trustees"), (Footnote continued on next page)

"Government") which seeks judicial determination of the standard applicable to desegregation of higher education.

In 1974, the Government instituted a lawsuit against the State of Louisiana and the boards and agencies which then had responsibility for public higher education, alleging violations of Title VI of the Civil Rights Act of 1964 and the equal protection clause of the fourteenth amendment to the Constitution of the United States. In 1981, without any admission of liability, the parties entered into a Consent Decree which was approved by the United States District Court for the Eastern District of Louisiana. *See United States v. Louisiana*, 527 F. Supp. 509 (E.D. La. 1981).[2] By its terms, the Consent Decree was to expire automatically on December 31, 1987, unless the Plaintiff (Government) timely filed a motion to determine whether the State's system of public higher education was being operated on a unitary basis. The Government so moved on December 29, 1987. Subsequently, motions for summary judgment were filed by the Government and by Regents. On August 2, 1988, the three-judge district court granted the Government's motion for partial summary judgment on the issue of liability. *See United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988). The district court then instructed the parties to submit proposed plans to desegregate public higher education in Louisiana and appointed a Special Master to consider and make recommendations regarding remedy. Minute Entry dated Oct. 7, 1988; Order dated Dec. 2, 1988.

(Footnote 1 continued)

which has management responsibility for nine institutions of higher education, eight of which are predominantly white and one of which, Grambling State University ("Grambling"), is predominantly black in their respective student body compositions; the Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University"), which is a system consisting of three institutions, the student body composition of which is predominantly black; and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"), which is a system consisting of seven institutions, the student body composition of which is predominantly white.

[2] For the earlier history of the case, see *United States v. Louisiana*, 543 F.2d 1125 (5th Cir. 1976); *United States v. Louisiana*, 90 F.R.D. 358 (E.D. La. 1981), *aff'd*, 669 F.2d 314 (5th Cir. 1982).

On July 19, 1989, the three-judge district court adopted, with modifications, the Special Master's Final Report and Proposed Order. *See United States v. Louisiana*, 718 F. Supp. 499 (E.D. La. 1989). On September 18, 1989, the case was appealed to the United States Court of Appeals for the Fifth Circuit from the district court decisions pertaining to liability and remedy.[3] On August 29, 1990, the Fifth Circuit remanded the consolidated appeals to the district court for entry of further orders.

On October 30, 1990, the district court, reconsidering its previous decisions in light of the intervening decision in *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (en banc), *cert. granted sub nom. Ayers v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991) (consolidated with *United States v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991)) ("*Ayers III*"), vacated its order of August 2, 1988, denied the Government's motion for summary judgment, and granted summary judgment in favor of all defendants. *See United States v. Louisiana*, 751 F. Supp. 606 (E.D. La. 1990). The Government's appeal of that judgment, the appeal of Southern University and various cross appeals are pending before the Fifth Circuit in consolidated Case Number 90-3874.[4] Thus, the Governor of Louisiana, Regents and LSU (hereinafter "Amici") have a direct and substantial interest in the issues presented to the Court in *Ayers III*.

The Louisiana litigation addresses issues of law substantially similar to those presently at bar. Through this brief, Amici urge the Court to adopt a standard for desegregation in higher education

[3] Prior to that appeal, various parties took direct appeals of the three-judge district court's determinations to this Court. The Court stayed the enforcement of the district court's judgment and orders pending docketing of the appeals and disposition of the cases. *Southern University Board of Supervisors v. United States*, 492 U.S. 934 (1989); *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, 492 U.S. 934 (1989). On January 8, 1990, the Court entered orders, without opinion, that the direct appeals to it from the district court "are dismissed for want of jurisdiction." *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990); *Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990); *Louisiana ex rel. Charles E. "Buddy" Roemer, III, Governor v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990).

[4] On May 6, 1991, the Fifth Circuit granted the Government's motion to stay the appellate proceedings in Case Number 90-3874 pending the disposition of *Ayers* before this Court.

appropriately based upon the reasoning advanced by this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986), and by the Fifth Circuit in *Ayers III*. Additionally, under the 1981 Consent Decree, Louisiana gained valuable experience, at great cost, in what steps are unreasonable, impractical and educationally unsound in attempting to achieve greater racial mixture at Louisiana's predominantly black institutions. Amici submit that knowledge of this experience will prove helpful to the Court in determining the appropriate standard of liability. Furtheremore, Amici have access to information, not heretofore presented to the Court, concerning the development of the criteria issued by the former Department of Health, Education and Welfare ("HEW") discussed at length in the Brief *Amici Curiae* of Joseph A. Califano, Jr., Mary F. Berry, Ernest L. Boyer and David Tatel ("Califano Group") at 1-14, the Brief of the NAACP Legal Defense and Educational Fund, Inc., American Civil Liberties Union, and the National Conference of Black Lawyers as Amici Curiae in Support of Petitioners ("LDF Group") at 27-34, and the Brief of Petitioners at 48-51, 69-70.

SUMMARY OF ARGUMENT

Confusion over the legal standard applicable to desegregation of higher education has been and remains the norm. Issues of liability and remedy have been addressed by different courts in decidedly different ways. This confusion has hindered efforts to define clearly what constitutes liability and has often resulted in remedies that make little educational or desegregative sense.

It is undisputed that segregation of public institutions on the basis of race is unconstitutional. Consequently, states have an affirmative duty to dismantle *de jure* systems in the realm of both elementary and secondary as well as higher education. While the extent of a state's duty in this regard has been adjudicated on the elementary and secondary school levels in cases such as *Green v. County School Board*, 391 U.S. 340 (1968), it has not been determined by this Court in the context of higher education.

Courts which have considered the proper legal standard, regardless of their approach to liability and remedy, have recognized that the inherent differences between higher education and elementary and

secondary education require different standards for determining compliance with the constitutional mandate to desegregate. *See Bazemore v. Friday*, 478 U.S. 385 (1986); *Alabama State Teachers Ass'n v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969) ("*ASTA*"). Focusing on the significance of student choice in higher education, both the district court and the en banc Fifth Circuit recognized that *Bazemore*, *ASTA* and *Green* supply the appropriate standard for assessing Title VI and fourteenth amendment compliance in higher education. *Ayers III*, 914 F.2d 676; *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987) ("*Ayers I*"). *ASTA* and *Bazemore* are consistent with *Green* and indicate that in determining whether a unitary system exists, the Court should look beyond the racial composition of the institutions of higher learning and focus instead on the efforts to desegregate and the degree to which unfettered student choice exists and predominates. Thus, the appropriate inquiry into compliance is not the relative degree of integration of each institution, but instead, the actual contemporary factors contributing to the racial composition of the institutions.

Louisiana's attempts under the 1981 Consent Decree to affect enrollment patterns through costly programmatic and physical "enchancements" at predominantly black institutions proved to be an abysmal failure. *United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988). The Louisiana experience provides convincing evidence that programmatic and capital enhancement of institutions of higher learning will not significantly alter the racial composition of those institutions and, therefore, failure to provide such enhancement cannot form the basis for liability.

Likewise, the criteria issued by the former Department of Health, Education and Welfare ("HEW") purporting to spell out the ingredients of Title VI compliance do not control Title VI litigation and should be given no weight whatsoever. Private petitioners, the Califano Group and the LDF Group, while conceding that the criteria are not rules having the force and effect of law, attempt to tie the criteria to the non-specific Title VI regulation, 34 C.F.R. Sec. 100.3(b)(6)(i), in such a way as to lend the criteria authority to which they are not otherwise entitled. There is absolutely no basis for the wooden application of criteria which were not developed in a serious manner and were never intended to have the effect of law.

ARGUMENT

I. THE CONSTITUTIONAL REQUIREMENT OF EQUAL PROTECTION MUST BE VIEWED DIFFERENTLY IN HIGHER EDUCATION AS CONTRASTED WITH PRIMARY AND SECONDARY EDUCATION.

A. The History Of Title VI Enforcement In Higher Education Is Important To The Analysis of Liability.

In 1978, during the height of the federal Title VI higher education enforcement effort, David A. Tatel, former director of HEW's Office of Civil Rights, described Title VI compliance as being achieved when "*enough* blacks [attend] the white schools and *enough* whites [attend] the black schools . . . ." Tatel, *HEW's Voice In College Crisis*, The Virginian-Pilot, The Ledger-Star, Dec. 10, 1978, C1, Col. 1 at C3 (emphasis added) (Appendix at 4a). Since that time, colleges and universities throughout the South have continued to receive similarly insightful direction from HEW's successor, the Department of Education, and from the Department of Justice.[5]

---

[5] In the Louisiana Title VI litigation, Government and Southern University witnesses have reasoned the appropriate other-race compositions to be, variously, 25%-30% white in the predominantly black institutions and 25%-30% black in the predominantly white institutions, Testimony of Clifton F. Conrad taken February 6, 1989 ("Conrad Testimony") at 303 (Appendix at 6a); 40% white in predominantly black Southern University in New Orleans, Deposition of Dr. Robert B. Gex taken February 16, 1989 ("Gex Deposition") at 20-21 (Appendix at 10a); 20%-30% white at predominantly black Southern University in Baton Rouge over fifteen to twenty years and minimum 15% black in predominantly white institutions, Deposition of Dr. Dolores R. Spikes taken February 28, 1989 ("Spikes Deposition") at 79-81 (Appendix at 16a).

The only documented effort by HEW and the Department of Education to spell out the ingredients of Title VI compliance was the issuance of criteria to be applied to the formerly *de jure Adams* states. *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6,658 (1978); *Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 42 Fed. Reg. 40,780 (1977) (hereinafter "Criteria"). The soundness of these Criteria, however, has not been approved by any court and the regulatory process by which they were developed was flawed. *See* discussion *infra* at 24-30.

Confusion over legal standards for Title VI compliance in higher education has plagued the Government, the higher education community and the courts. The major barrier to defining unitary higher education in the South has been the question of how to treat those institutions that were formerly all black and remain predominantly black.[6] Issues of liability and remedy have been addressed by different courts in decidedly different ways. *See, e.g., Geier v. Blanton*, 427 F. Supp. 644, 657 (M.D. Tenn. 1977), *aff'd sub nom. Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979) (merger of proximately located predominantly black institution and predominantly white institution ordered); *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va.), *aff'd sub nom. Board of Visitors v. Norris*, 404 U.S. 907 (1971) (state enjoined from expanding from two to four years predominantly white institution located in geographic proximity to a four-year predominantly black institution); *ASTA*, 289 F. Supp. 784 (new four-year institution permitted to be established as branch of predominantly white institution in same community with predominantly black institution).[7]

---

[6] The Government has had its own problems in articulating its intentions toward predominantly black institutions:

> Well, Your Honor, there is no truth to the fact that we are trying to eliminate the black institutions. What we are trying to do is eliminate the identifiability as black institutions of the black institutions. . . .
>
> Your Honor, this is a difficult concept and we acknowledge that it's not an easy concept. . . .
>
> It's not an impossible concept though.

Mandel v. United States Dep't of Health, Educ. and Welfare, 411 F. Supp. 542, 553 (D. Md. 1976), *aff 'd by an equally divided Court sub nom. Mayor of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1977), *cert. denied*, 439 U.S. 862 (1978). This same district court characterized the Government's conduct in its Title VI efforts against Maryland as "outrageous," "unreasonable," "startling," "perplexing," "duplicitous," "arbitrary," "cavalier," "uncooperative," "paradoxical," and "capricious." *Id.* at 548-63.

[7] *See also Artis v. Board of Regents*, No. CV 479-251, slip op. at 7 (S.D. Ga. Feb. 2, 1981) (Appendix at 23a) ("the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these official acts").

Perhaps the most glaring illustration of the inability of the Government, private plaintiffs and the judicial system to develop and apply educationally sound desegregation remedies in higher education can be found in the painful history of the Tennessee higher education desegregation litigation. The first order specifying injunctive relief in that litigation was entered by the United States District Court for the Middle District of Tennessee in 1968. *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968). After numerous failed attempts to affect student choice, the district court in 1977 entered an order requiring the draconic "remedy" of merger as the last best hope for desegregation of those institutions. *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977). While merger did indeed eliminate the University of Tennessee at Nashville, a predominantly white institution, seven years later the court noted that Tennessee State University, the surviving institution, which had been and remained predominantly black, had steadily become resegregated. *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984). Significantly, the court at that time also took judicial notice of the existence of strong support in the black community for maintaining Tennessee State University as a black institution. *Id.* at 1265. Indeed, the end of court supervision of Tennessee's higher education system is not yet in sight. More than twenty years after the initial lawsuit, the United States Court of Appeals for the Sixth Circuit still found itself bogged down in resolving issues springing from this mired litigation. *Geier v. Richardson*, 871 F.2d 1310 (6th Cir. 1989).[8]

[8] Ironically, Amicus Curiae State of Tennessee proudly champions the "effectiveness of [Tennessee's] court-ordered desegregation remedies," and claims that the "present effects of past *de jure* segregation have been eliminated" in its institutions of public higher education. *See* Amicus Curiae Brief of the State of Tennessee in Support of United States at 9. Despite these assertions, Dr. Wayne Brown, former Executive Director of the Tennessee Higher Education Commission, has testified that the Tennessee desegregation remedies were, in fact, failures. *See* Supplementary Report of Wayne Brown, dated January 30, 1989, at 4, 11 (Appendix at 28a, 33a). Asked to give an opinion as to whether the merger of the University of Tennessee at Nashville ("UTN") and Tennessee State University ("TSU") had been successful, Dr. Brown stated, "[i]n spite of the provision of the resources of both UTN and TSU, and in spite of special funding from the state, the 'new' TSU does not represent a successful merger...." Report of Wayne Brown, dated May 11, 1988, at 10 (Appendix at 38a). Dr. Brown also noted that the "merged institution . . . lost significant enrollment," *see id.* at 6 (Appendix at 37a), and "has not achieved the racial goals anticipated by the court." *See id.* at 9 (Appendix at 38a).

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Much of the confusion over the treatment to be accorded to predominantly black colleges and universities stems from *dicta* taken from the early rulings in the so-called *Adams* cases:

> "These Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education." The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education.

Adams v. Califano, 430 F. Supp. 118, 120 (D.D.C. 1977) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973)).[9] This protectionist language of the *Adams* cases has made the task of integration more difficult because it afforded the appearance of legitimacy to subsequent arguments that black institutions must be maintained to serve black students. As conceded by Clifton Conrad,

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(Footnote 8 continued)

Moreover, when comparing black student enrollment at the flagship institutions of the eleven states of the Old Confederacy, Tennessee's flagship institution ranks a poor tenth in percentage of undergraduate black student population, and ninth in percentage of overall black student population. *See* 1988 Fall Enrollment, U.S. Department of Education, Integrated Post-Secondary Education Data (IPEDS) (University of South Carolina-Columbia (Undergraduate ("U") 13.95%; Overall ("OA") 12.35%); University of Alabama-Tuscaloosa (U: 9.49%; OA: 8.54%); University of Virginia-Charlottesville (U: 9.34%; OA: 7.60%); University of North Carolina-Chapel Hill (U: 8.98%; OA: 7.80%); Louisiana State University-Baton Rouge (U: 7.57%; OA: 7.08%); University of Florida (U: 6.65%; OA: 5.82%); University of Mississippi-Oxford (U: 6.33%; OA: 6.65%); University of Georgia (U: 5.15%; OA: 4.70%); University of Arkansas-Fayetteville (U: 5.15%; OA: 4.41%); University of Tennessee-Knoxville (U: 4.65%; OA: 4.52%); University of Texas-Austin (U: 4.10%; OA: 3.55%)).

[9] Despite the court's admonition that special circumstances must be afforded predominantly black institutions, as articulated in the *Adams* cases, that conclusion is certainly open to question if the very existence of predominantly black institutions constitutes a violation. Moreover, it must be remembered that the *Adams* cases involved, with one inconsequential exception, only the alleged failure of HEW to enforce Title VI. No former *de jure* states were parties in *Adams* and virtually none of the issues presented here was developed or debated in those cases. Indeed, no question of what constituted liability in higher education was ever considered. There was an assumption that liability existed and that remedies were required. The litigation was primarily characterized by its lack of adversity between the parties and, until 1984, the only serious controversy in the litigation involved the time frame for government enforcement efforts.

the Government's own expert in the Louisiana, Alabama and Mississippi Title VI litigation, the much more intractable problem in Louisiana (and elsewhere) in higher education desegregation is that of increasing white presence in predominantly black institutions, as opposed to increasing black presence in predominantly white institutions. Conrad Testimony at 313-14 (Appendix at 7a-8a).[10] Consequently, the most intractable problem has been made even more difficult to solve because some black administrators and others, relying heavily upon the protectionist language of *Adams*, have argued for the maintaining of predominantly black institutions, reasoning that only black institutions can educate black students.[11] One of the most emphatic arguments in this regard comes from Dr. Dolores R. Spikes, President of the Southern University System, who, in the Louisiana Title VI litigation offered testimony that:

> Historically, white colleges are not capable of addressing the needs of black students because whites are socially and culturally deprived of understanding the needs, desires, abilities, and mores of black students.

Statement of Dr. Dolores Spikes dated January 30, 1989 ("Spikes Statement") at 29 (Appendix at 42a).[12]

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[10] The Government's attitude toward the integration of predominantly black institutions has only exacerbated the problem. The Criteria themselves were drafted with protection of the black colleges in mind. As Mr. Tatel commented in a 1979 interview:

> And we, under the direction of the court, have tried to draft these standards in a way that *protects black colleges*. And the *major part of them* requires the states to strengthen black colleges by giving them new programs and by giving them adequate funding [so that they can] compete with white institutions.

The MacNeil/Lehrer Report: Black Colleges, (PBS television broadcast, Apr. 10, 1979) (emphasis added) (Appendix at 40a). *See also* Criteria, 43 Fed. Reg. at 6,660; Testimony of Sheldon E. Steinbach, *infra* at 29-30.

[11] Indeed, the credit for the protectionist concept was originally given by the *Adams* court to the National Association of Equal Opportunity in Higher Education, an association of the presidents of 110 predominantly black colleges. *Adams v. Richardson*, 480 F.2d at 1165 n.11.

[12] To the extent this attitude suggests that predominantly white institutions in the South are inhospitable to black students, it is instructive to note the observation by Yale's distinguished historian, C. Vann Woodward, that, "[h]owever defined, by

(Footnote continued on next page)

Similarly, in the Alabama Title VI litigation, Joe Reed, Chairman of the Alabama State University Board of Trustees, unflinchingly expressed that predominantly black institution's philosophy when he said, "There may be some redeeming value in *Plessy v. Ferguson* [163 U.S. 537 (1896)]." *See* Testimony of Joe Reed at 134, *Knight v. Alabama*, No. 83-M-1676-S (N.D. Ala. dated Feb. 12, 1991) (Appendix at 45a). In the Alabama litigation, the goal of maintaining the predominantly black institutions has translated into a demand that the "promise" of *Plessy v. Ferguson* be fulfilled, that predominantly black Alabama State University and Alabama A&M University be designated flagship institutions, and that they be transformed into counterparts of the predominantly white University of Alabama System and Auburn University. *See id.* at 135-36 (Appendix at 46a).

Thus, in the area of higher education and desegregation, the Government has demonstrated an unparalleled inability either to define what constitutes liability or to propose remedies that make educational or desegregative sense. The Government is no further along in 1991 in its clarity of thinking about these issues than it was in 1978 when Mr. Tatel offered that an appropriate standard would be achieved when enough blacks were in the predominantly white institutions and enough whites were in the predominantly black institutions. Indeed, the Government continues to add to the confusion. In the Alabama Title VI litigation, the Government took the position in 1985 that use of the ACT (which in Alabama is employed in conjunction with high school grades, *see United States v. Alabama*, 628 F. Supp. 1137, 1161, 1162, 1164 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987)) for admission purposes, did not constitute a violation of Title VI. *See* Trial Transcript at 5331, *United States v. Alabama*, No. 83-P-1676-S (N.D. Ala. dated July 27, 1985) (Appendix at 47a-48a). Nathaniel Douglas, Chief of the Justice Department's Civil Rights Division, Educational Opportunities Litigation Section, made the Government's position explicit:

(Footnote 12 continued)

far the greater number of racial incidents occurs at northern universities, with Massachusetts leading them all." Woodward, *Freedom & the Universities*, The New York Review Of Books, July 18, 1991 at 32, 35 (Appendix at 43a). If there is a problem, it is one that is national in scope and unrelated to the era of *de jure* segregation.

> Your Honor, if I can make the record clear, the government is not challenging the use of the ACT as part of the admissions process. We concede that point.

Id. (Appendix at 48a).

In 1991, however, the Government inexplicably reversed itself, asserting at retrial that Alabama's use of the ACT, even in conjunction with high school grades, should be enjoined. *See* Proposed Findings Of Facts And Conclusions Of Law Submitted by the United States, *Knight v. Alabama*, No. 83-M-1676-S (N.D. Ala. dated June 5, 1991). More specifically, the Government contends that:

> The circumstances surrounding the adoption of the ACT admissions policy, therefore, leads [sic] one to the inescapable conclusion that the desire to exclude blacks from historically white institutions and to thereby preserve the historical racial character of those institutions was a motivating factor in the policy's adoption and implementation. . . .

Id. at 38 (Appendix at 49a). Here, however, the Government attacks "Mississippi's exclusive reliance on ACT scores" as "lack[ing] a legitimate educational justification," but implies it would approve the ACT, if used in conjunction with high school grades: "the use of grades in conjunction with ACT scores provides more accurate predictions of college performance." *See* Brief for the United States at 36. Mississippi, suggests the Government, "could remove this remnant . . . without significant difficulty," particularly since "[m]ost other States use high school grades and other criteria in conjunction with ACT to determine college admissions." *See id.* at 37. Thus, the Government, having established two different positions on this issue, now misleadingly implies approval of an admissions practice it recently attacked in the Alabama litigation and would no doubt view unfavorably in Mississippi because of "[t]he circumstances surrounding [its] adoption."[13]

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[13] Additionally, seemingly dissatisfied with the treatment accorded the term "vestiges," the Government now seeks to replace the word with "remnants." *See* Brief for the United States at 27 n.27.

The Government's current focus on the use of the ACT for admissions purposes is misplaced. Even in systems in which open admissions existed, the Government has been dissatisfied with the desegregative results. Indeed, in the Louisiana litigation, the three-judge district court recognized that Louisiana's open admissions practice was "counter-productive, both in terms of educational objectives and racial integration." *United States v. Louisiana*, 718 F. Supp. 499, 510 (E.D. La. 1989), *vacated*, 751 F. Supp. 606 (E.D. La. 1990). Adopting the Special Master's recommendation in its Remedial Order, the district court directed an end to the open admissions system and ordered the implementation of selective admissions requirements. *Id.* at 517. The district court also recognized that the "ACT and other standardized test scores provide valuable data." *Id.*

In contrast with the Government, private plaintiffs and the predominantly black institutions have been much more consistent and straightforward in their theory of these Title VI cases. While giving lip service to desegregation, they have made it abundantly clear that they wish to maintain their black identity by recruiting more black students into institutions that, through "enhancement," will have a greater variety of academic programs and newer facilities. This view of the mission of predominantly black institutions is merely another form of separatism, which cannot be constitutionally condoned in state-supported higher education.[14] By attributing some higher purpose to "remedies" that glorify the value of intentionally maintaining separate institutions as bastions of black higher education, proponents of this view seek to justify what the Fifth Circuit correctly characterized as the "revolting principle" of "designat[ing]. . . Black Schools for black students, [which] shall at all times remain equal in funding, offerings, and facilities with their counterparts designated as White Schools." *See Ayers III*, 914 F.2d at 692.

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[14] Should black students freely choose to attend predominantly black institutions, uninfluenced by an organized campaign toward that end by public officials, then Amici would agree that no Title VI or constitutional violation exists. *See* discussion *infra* at 18-19.

B. The Standard Of Title VI And Fourteenth Amendment Liability Adopted By The Fifth Circuit Is Correct.

It is well-settled law that segregation of public institutions on the basis of race is unconstitutional. *See Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). Further, "separate-but-equal" educational institutions do not satisfy the constitutional requirement of equal protection found in the fourteenth amendment. *See id.*; U.S Const. amend. XIV. Consequently, policies and practices adopted by the states must be racially non-discriminatory in both elementary and secondary as well as higher education.[15] Those states that have previously maintained racially dual educational systems have the affirmative duty to eliminate all vestiges of the *de jure* era segregation.[16] The operation of a "unitary system" satisfies this duty.[17]

Amici do not claim that *ASTA*, *Bazemore* and *Ayers III*, which distinguish higher education from elementary and secondary education, limit the duty to eliminate vestiges of *de jure* segregation. Unquestionably, all educational programs have both a constitutional duty and a statutory incentive to desegregate. However, a major issue to be decided in this case is the nature and scope of that duty. The differences between higher education and elementary and secondary education relate to more than the means by which vestiges shall be removed; the differences relate as well to the determination of liability. *See Ayers III*, 676 F.2d at 682-83, 687.

1. The Existence Of Racially Identifiable Higher Education Institutions Is Not Inconsistent With The Goal Of A Unitary System.

This Court has instructed that, in determining the extent to which a state has dismantled its formerly *de jure* system, the issue should be assessed "in light of the circumstances present and the options avail-

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[15] *See Florida, ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 414, *reh'g denied*, 351 U.S. 915 (1956) (black applicant entitled to prompt admission to graduate program under rules and regulations applicable to other qualified applicants); *see also* 42 U.S.C. Section 2000d, 2000d-1 (1982).

[16] *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (quoting *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 15 (1971)).

[17] *See generally Swann*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968); *Brown*, 347 U.S. 483 (1954).

able in each instance." *Green v. County School Board*, 391 U.S. 430, 439 (1968). In the higher education context, judicial intervention may not be appropriate in circumstances that might otherwise call for such intervention in the elementary and secondary education setting. *ASTA*, 289 F. Supp. at 787-88. In support of this distinction, the *ASTA* court stated that unlike elementary and secondary schools, in higher education, students choose which institution they will attend, if any; and that choice involves a broad array of considerations not relevant on the elementary and secondary levels. *Id.* at 788. Because of these factors, the court in *ASTA* was concerned that judicial intervention in higher education would involve the court in "a wide range of educational policy decisions in which the courts should not become involved." *Id.* Therefore, the court held that the "*scope* of the [affirmative duty to dismantle the dual system] should [not] be extended as far in higher education as it has been in the elementary and secondary public schools area." *Id.* at 787 (emphasis in original). Rather, the court held that to the extent that a dual school system, on the college level, may be based on racial considerations, the affirmative duty to dismantle such a system is satisfied if the state and particular institutions are dealing with faculty, staff and admissions in good faith. *Id.* at 789-790.

Consequently, in the higher education setting, a court should look beyond the numbers and percentages of other-race attendance to the actual contemporary factors contributing to the racial composition of the institutions. This was precisely the approach taken by the district court and the en banc Fifth Circuit in the instant action.

2. *ASTA*, *Bazemore* And *Green* Supply The Appropriate Standard For Assessing Title VI And Fourteenth Amendment Compliance In Higher Education.

The Fifth Circuit in the action below properly defined the appropriate standard for determining compliance with Title VI:

> the state . . . satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures. [Footnote omitted]

Ayers III, 676 F.2d at 687.[18] The Fifth Circuit found that the record made clear that "Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish." *Ayers III*, 676 F.2d at 678. With this emphasis on student choice in the higher education context, the Fifth Circuit reasoned that *Green* stood in harmony with *Bazemore* and *ASTA*. *See id.* at 685.

a. Higher Education Is Not Comparable To Elementary And Secondary Education.

Critical to the Supreme Court's decision in *Green* was its finding that, despite a freedom of choice plan, the two schools in question were still identifiably black and identifiably white. As discussed above, while racial mix may be an appropriate standard for assessing elementary and secondary school Title VI or fourteenth amendment violations, racial composition alone, in the higher education context, cannot properly form the basis for such liability.

The inherent differences between these two levels of educational institutions require different standards for determining compliance with the constitutional mandate to desegregate. Attendance at public elementary and secondary schools is compulsory. Students attend free of tuition and academic programs are, by and large, fungible.[19] States

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[18] Similarly, the district court found that:

> . . . the scope of the affirmative duty to disestablish a former *de jure* segregated system of education is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend college at all and, if so, which one.

Ayers I, 674 F. Supp. 1523, 1553 (N.D. Miss. 1987).

[19] Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive towards uniformity in offerings, facilities and services. The opposite is true in higher education. A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education.

Ayers I, 674 F. Supp. at 1554.

maintain control over public elementary and secondary schools by empowering school boards to create school attendance areas and "otherwise [to] designate the school that particular students may attend." *Bazemore*, 478 U.S. at 408 (White, J., concurring). Desegregation in that context, therefore, is merely a function of whether the buses roll. Such control is not available in public higher education where attendance is voluntary, tuition is charged and programs are diverse. *Ayers III*, 914 F.2d at 687; *see also Ayers I*, 674 F. Supp. at 1554.

The circumstances in higher education are inherently and fundamentally different from those in elementary and secondary education because student choice is such an integral factor. As early as 1969, in *ASTA*, this Court implicitly acknowledged this distinction by affirming the district court's decision which recognized the effect of student choice in higher education. *See ASTA*, 289 F.Supp. 784, *aff'd mem.*, 393 U.S. 400 (1969). The lower court observed:

> [p]ublic elementary and secondary schools are traditionally free and compulsory.... Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few.

289 F. Supp. at 787-788.

As the *ASTA* court made clear, higher education requires the element of free choice to assure the best match between student and school. Unlike elementary school and high school, college is and must be a matter of choice for its students. This fundamental distinction is critical when evaluating desegregation in higher education.

b. The Significance Of Choice In The Higher Education Setting Compels The Application Of A Different Standard For Determining Title VI And Fourteenth Amendment Compliance.

The significance of choice in determining Title VI and fourteenth amendment compliance was the focus of the *Bazemore* and *ASTA* cases. In *Bazemore*, five Justices observed that because the 4-H and Homemaker Clubs at issue had discontinued their segregated club policy, whatever racial imbalance existed after that time was, "the result of wholly voluntary and unfettered choice of private individuals." 478 U.S. at 407 (White, J., concurring). The Justices stated that no Title VI or fourteenth amendment violation could be found where the clubs had discontinued their prior discriminatory practices and adopted a wholly neutral admissions policy (which policy was disseminated through club leaders and the media). *Id.* at 408. "The mere continued existence of single-race clubs does not make a constitutional violation . . . [where] one's choice of a Club is entirely voluntary." *Id.*

Similarly, the courts in *ASTA* and *Ayers I* held that the existence of racially identifiable colleges is not dispositive as to whether the state and the institution have discharged their duties under Title VI and the fourteenth amendment. Rather, as the *ASTA* court reasoned:

> [A]s long as the State and the particular institution are dealing with admissions, faculty and staff in good faith, the basic requirement of the affirmative duty to dismantle the dual system on the college level, to the extent that the system may be based upon racial consideration, is satisfied.

289 F. Supp. at 789-90.[20]

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[20] *See also Board of Educ. of Oklahoma City Public Schools v. Dowell*, ___ U.S. ___, 111 S.Ct. 630, 638 (1991) ("The District Court should address itself to whether the Board had complied in good faith with the desegregation decree, . . . and whether the vestiges of past discrimination had been eliminated to the extent practicable."); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 531 n.5 (1979) ("[r]acial imbalance . . . is not per se a constitutional violation"); *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[t]hat there are both predominantly black and predominantly white schools

(Footnote continued on next page)

Likewise, in *Ayers III*, the court stressed that the State of Mississippi's obligation in disestablishing a former *de jure* system does not include limiting student choice. *Ayers III*, 914 F.2d at 687. The court found that Mississippi's institutions of higher learning were predominantly black or predominantly white because students had exercised unfettered choice in selecting which institution to attend. *Id.* at 678, 692. *See also Ayers I*, 674 F. Supp. at 1558. Thus, it is implicit that the racial composition itself is not evidence of a violation of Title VI or the fourteenth amendment. This is particularly so where a state and its institutions have employed numerous measures to eliminate the vestiges of *de jure* segregation.[21] Accordingly, this Court should not be persuaded that the existence of racially identifiable institutions evinces vestiges of the former system.

As *ASTA*, *Bazemore*, and *Ayers III* make clear, the determination of whether desegregation has been achieved in the higher education setting is to be based on the state's efforts to desegregate and the unfettered freedom of students to attend the institution of their choice. This is the proper measure of a state's success in meeting the goal of a unitary system and the appropriate inquiry for determining a state's compliance with Title VI and the fourteenth amendment. An inflexible application of *Green* to determine Title VI and fourteenth amendment compliance simply fails to account for the crucial differences between elementary and secondary schools and higher education.

This is the analysis set forth in both the district court opinion and the en banc Fifth Circuit opinion. That analysis and application of *Bazemore* to the instant facts was proper and should be affirmed.

(Footnote 20 continued)

in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action'" (quoting *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973)); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976) (substantive constitutional right to a particular degree of racial balance or mixing is disapproved).

[21] *See Ayers I*, 674 F. Supp. at 1558 (after holding that the racial composition of Mississippi schools was the result of student choice, the court went on to find that, ". . . defendants have used every reasonable means at their disposal in their recruitment efforts. Defendants' efforts . . . satisfy their affirmative duty to dismantle the former segregated system insofar as the duty pertains to student enrollment.").

II. INCREASED ENHANCEMENT OF PREDOMINANTLY BLACK INSTITUTIONS WILL NOT SIGNIFICANTLY ALTER THE RACIAL COMPOSITION OF INSTITUTIONS OF HIGHER LEARNING.

A. Failure To Effect Enhancement Of Predominantly Black Institutions As Indicia Of Liability Is A Return To The Era Of Separate-But-Equal And Should Be Rejected.

Throughout the vacated panel decision in *Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990) ("*Ayers II*"), the majority refers to a purported under-enhancement of predominantly black institutions as compared to predominantly white institutions. *Ayers II*, 893 F.2d at 736-44, 752-53. Implicit in the majority's discussion is the notion that failure to effect certain enhancement gives rise to liability under Title VI and the fourteenth amendment. *Id.* at 752-54. Such a position, if implemented, would result in the creation of "separate-but-equal" institutions, which the law abjures. In *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988), the three-judge district court condemned the enhancement approach as coming "treacherously close to a mandate of the 'separate but equal' doctrine which has been emphatically rejected ever since *Brown I*." *Id.* at 657. This enhancement theory has been similarly rejected by Judge Allgood's concurrence in *United States v. Alabama*, 791 F.2d 1450, 1460 (11th Cir. 1986) (Allgood, J., concurring) (rejecting the proposition that predominantly black institutions have a right to "preferential treatment or status as vicarious victims of prior discrimination"), and by the Fifth Circuit in *Ayers III*, 914 F.2d at 692 (characterizing designation of "Black Schools" for black students as a "revolting principle").

The enhancement theory resurrects the "separate-but-equal" doctrine and has been soundly criticized in those states where it has been aired. Packaging enhancement as a mechanism for attracting white students to predominantly black institutions cannot circumvent the problem. Moreover, this attempt to justify enhancement of predominantly black institutions as a desegregative device is contradicted by the empirical results of the Louisiana experience.

B. Louisiana's Enhancement Funding of Predominantly Black Institutions Pursuant To The 1981 Consent Decree Failed To Increase Significantly White Enrollment In Those Institutions.

In 1981, the Louisiana litigants, without conceding liability, sought a solution to further desegregation through a negotiated Consent Decree approved by the district court in September of that year. *United States v. Louisiana*, 527 F. Supp. 509 (E.D. La. 1981). The Consent Decree was premised on the hope that programmatic and physical enhancements at predominantly black institutions would significantly affect enrollment patterns. Not only did the Louisiana enhancements fail to attract a significant number of white students to predominantly black institutions, the enhancements may have influenced the decision of a higher percentage of black students to attend predominantly black rather than predominantly white institutions.[22]

In short, the Consent Decree proved to be an abysmal failure. *United States v. Louisiana*, 692 F. Supp. at 658. During the life of the Consent Decree, 1981-87, the three-judge district court found that the percentage of black students enrolled at predominantly white institutions actually had declined from 55% to 47% of the black students enrolled at institutions of public higher education in Louisiana. *Id.* at 645.[23] On the other hand, black institutions showed only a negligible increase in white enrollment from approximately 0.3% of all white

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[22] Even the Government, at long last, seems to recognize the futility of "enhancement" as a desegregative tool. *See* Brief for the United States at 32. Indeed, the Government concedes that "'improved' duplication might well have the perverse effect of encouraging students to attend a school where, other things now being more nearly equal, their own race predominates." *Id.*

[23] Although overall black student enrollment as a percent of in-state and out-of-state enrollees declined, over 55% of Louisiana in-state black students enrolled in predominantly white institutions. *See* 1988 Fall Enrollment, U.S. Department of Education, Integrated Post-Secondary Education Data (IPEDS). In Alabama, almost 60% of black high school graduates who enroll in public higher education enroll in predominantly white institutions. Hearing Testimony of Edward Rutledge, Director of Information and Physical Systems, Alabama Commission on Higher Education, at 194-96, *Knight v. Alabama*, No. 83-M-1676-S (N.D. Ala. dated May 3, 1990) (Appendix at 50a).

students enrolled in 1981 to approximately 1.1% of all white students enrolled in 1987. *United States v. Louisiana*, 692 F. Supp. at 645.

Higher education in Louisiana is funded pursuant to a formula based on various objective criteria and applied with mathematical objectivity to all institutions. Direct Testimony of Marvin Roubique ("Roubique Statement") at 1-3 (Appendix at 51a-53a).[24] Pursuant to the 1981 Consent Decree, however, funding for predominantly black institutions and their programs was provided over and above this formula.[25] Despite this overall funding enhancement and despite the addition of sixty new academic programs[26] at the predominantly black institutions at a cost of $65,000,000 (Direct Testimony of Kerry Davidson ("Davidson Statement") at 1 (Appendix at 80a); Roubique Statement at 4 (Appendix at 53a)), an appropriation of over $50,000,000 for capital outlay (Direct Testimony of Douglas Rewerts ("Rewerts Statement") at 1 (Appendix at 83a)), and the implementation of other enhancement measures such as faculty development programs, white enrollment as of 1988 in the predominantly black institutions had increased by less than 1%.[27] *United States v. Louisiana*, 692 F. Supp. at 645. Of the sixty new academic programs implemented at the predominantly black institutions pursuant to the Consent Decree, only four had enrolled white students in any noticeable number. Direct Testimony of Larry Tremblay ("Tremblay Statement") at 3 (Appendix at 87a-88a). Put another way, in terms of desegregative effect, there had been fifteen program failures for each

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[24] Unless otherwise indicated, all further citations to direct testimony, statements and reports refer to those witness reports and affidavits submitted by the parties in the Louisiana Title VI litigation to the Special Master on February 1, 1989.

[25] For example, in the academic year 1987-1988, Consent Decree programs were funded 39.2% in excess of formula funding. Report of Lucie Lapovsky dated July 1988 ("Lapovsky Report") at 22 (Appendix at 72a). *See* Roubique Statement at 5-7 (Appendix at 54a-56a).

[26] Of the sixty-two new academic programs that were to be implemented at the predominantly black institutions pursuant to the Consent Decree, all but two were actually funded and implemented. *See* Trial Transcript of Dr. James H. Wharton ("Wharton Transcript") at 100, *Knight v. Alabama*, No. 83-M-1676-S (N.D. Ala. dated Apr. 2, 1991) (Appendix at 76a).

[27] All funding and enrollment figures are "as of" 1988 when they were submitted as part of the trial record in *United States v. Louisiana*, 692 F. Supp. at 642.

"success." Overall, black students accounted for 87% of the enrollment in the Consent Decree programs. Excluding the programs mentioned above, enrollment in Consent Decree programs was 93% black. This is a particularly poor showing for those programs theoretically selected, designed, and implemented specifically for the purpose of attracting white students.

The following specific examples of the failure of enhancements to attract white students to predominantly black institutions are instructive and clearly dispel the notion that institutional enhancement to accomplish desegregative objectives provides a solution. The bachelor of science degree in environmental chemistry at Southern University-Baton Rouge (a predominantly black institution) received $1,350,444 in supplemental funding and after five years of funding had a total of five students enrolled, none of whom was white. The bachelor of science degree in urban studies at Southern University-New Orleans had received $409,970 in funding and had enrolled six students, none of whom was white. At Grambling State University, of five of nine Consent Decree programs implemented with supplemental funding exceeding $5,000,000, not a single white student was enrolled.[28] At Southern University-Shreveport/Bossier, a predominantly black institution, in eleven of fifteen Consent Decree programs, not a single white student was enrolled.[29]

Even after Consent Decree academic program expenditures of more than $75,000,000 over seven years, exactly 211 white students had enrolled in Consent Decree programs. Tremblay Statement at 2-4 (Appendix at 86a-88a). Thus, excluding capital outlay, as of 1988, Louisiana had spent approximately $355,450 to attract each individual white student to a predominantly black institution. *See* Wharton Transcript at 105 (Appendix at 78a-79a).

Naturally, the facts and figures that define Louisiana's experience are different from the facts and figures in Mississippi. Yet, the Louisiana experience provides convincing evidence that programmatic and capital enhancement of institutions of higher learning will

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[28] Taking all nine programs together, white enrollment was only 15.72%. Tremblay Statement at 3 (Appendix at 87a-88a).

[29] Taking all fifteen programs together, white enrollment was only 9.58%. *Id.* at 4 (Appendix at 88a).

not significantly alter the racial composition of those institutions and, therefore, failure to provide such enhancement cannot form the basis for liability, while its provision may indeed result in resegregation.

III. THE CRITERIA ARE UNWORKABLE, PROCEDURALLY FLAWED AND CANNOT BE THE BASIS FOR A FINDING OF LIABILITY.

The private plaintiffs contend that respondents have not fulfilled the obligations imposed upon them by Title VI and its implementing regulations. More specifically, the private plaintiffs have set forth for review the separate question of "[w]hether the court of appeals erred by failing to apply a Title VI regulation [34 C.F.R. 100.3(b)(6)(i)] addressing defendants' remedial obligation . . . in a manner consistent with administrative standards [the Criteria][30] . . . ." Private petitioners, the Califano Group and the LDF Group place considerably more significance on the Criteria than is warranted.[31] As is made clear below, the soundness of the Criteria has not been approved by any court and the regulatory process by which they were developed was procedurally flawed. The Criteria are merely instructions, not rules, and failure to adhere to the Criteria cannot be the basis for a finding of liability. Thus, these Criteria should not be binding on this or any other Court and, especially in light of their checkered past, should not be given any weight in Title VI litigation.

A. The Revised Criteria Are Merely Guidelines And Not Rules.

The Criteria, by all accounts, were intended as guidelines for the development of plans for the desegregation of formerly *de jure* state

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[30] *See* complete citation, *supra* at 6 n.5.

[31] The Califano Group and the LDF Group do, however, concede that the Criteria are not rules and the Government relegates its discussion of the Criteria to a footnote on the final page of its brief. *See* Brief for the United States at 43 n.41.

Moreover, in its decision below, the en banc Fifth Circuit correctly recognized that it was unnecessary to discuss the scope of Mississippi's duty under 34 C.F.R. Sec. 100.3(b)(6)(i), to which the Criteria relate. *See Ayers III*, 914 F.2d at 687-88 n.11. The "affirmative action" regulation cited by private petitioners is virtually identical to 7 C.F.R. Sec. 15.3(b)(6)(i), upon which the *Bazemore* plaintiffs unsuccessfully relied. *Compare* 34 C.F.R. Sec. 100.3(b)(6)(i) (1989) *with* 7 C.F.R. Sec. 15.3(b)(6)(i) (1985). The Fifth Circuit correctly concluded, therefore, "that the duty outlined by the Supreme Court in *Bazemore* controls in Title VI cases," not the regulations. *Ayers III*, 914 F.2d at 687-88 n.11.

systems of public higher education.[32] Because the Criteria were never intended to be rules, the Government made no effort to comply with the rule-making procedures of the Administrative Procedure Act, ch. 324, 50 Stat. 237 (1947) (codified as amended at 5 U.S.C.A. Section 551 *et seq.* (1977 & Supp. 1989) ("APA").[33] Moreover, a blue ribbon panel formed to comment on and criticize the Criteria[34] was not conducted in accordance with the Federal Advisory Committee Act, 86 Stat. 770 (1976), as amended, 90 Stat. 1247, 91 Stat. 1634 (1980), 94 Stat. 3040, 96 Stat. 1822 (1982) (codified as amended at 5 U.S.C.A. App. 2 (1967 & Supp. 1989) ("FACA").[35]

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[32] Preamble to Criteria, 43 Fed. Reg. at 6,659 ("the Court ordered HEW to develop and issue within 90 days specific criteria to guide the six States [Arkansas, Florida, Georgia, North Carolina, Oklahoma and Virginia] in the preparation of revised desegregation plans").

[33] The Criteria were not published in the *Federal Register* for comment; the Criteria appeared in the *Federal Register* as issued by HEW, without any expectation or solicitation of public comment. HEW held no public hearings on the Criteria, but rather the Criteria were the result of "consultations" between HEW and "interested" outside parties. *See* 42 Fed. Reg. 40,782 (July 5, 1977).

[34] Although both the Preamble to Criteria and the Califano Group reference "two panels of nationally recognized educators" which advised an interdepartmental task force, *see* 43 Fed. Reg. at 6,661; Brief *Amici Curiae* of Califano Group at 7, the only evidence concerning any advisory panel is that which was developed in *In re North Carolina*, HEW Docket 79-VI-1 (filed Apr. 2, 1979). In that proceeding, the sole external panel referenced was the so-called "Blue Ribbon Panel," a description coined by HEW and employed, for example, by Peter Libassi, the General Counsel of HEW who directed the work on the Criteria. *See* Hearing Testimony of Harold Howe, II, ("Howe Testimony") at 2787-88, *In re North Carolina*, HEW Docket 79-VI-7 (dated Aug. 13, 1980) (Appendix at 93a).

[35] The blue ribbon panel meets the definition of an "advisory committee" under the FACA because it was a panel "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . ." 5 U.S.C.A. App. I, section 3(2) (subsequently amended on December 21, 1982, and now 5 U.S.C.A. App. 2, section 3(2)). As an advisory committee, the panel failed to meet the requirements of the FACA. There is no record that the public was informed of the advisory committee activities and that the committee itself was aware of views held by members of the public. *See* 5 U.S.C.A. App. I, section 9-10 (subsequently amended on Dec. 21, 1982, and now 5 U.S.C.A. App. 2, sections 9-10).

(Footnote continued on next page)

While there is no contention that the Criteria are rules, the private petitioners, the Califano Group and the LDF Group attempt to tie the Criteria to the non-specific Title VI regulation, 34 C.F.R. Sec. 100.3(b)(6)(i), in such a way so as to lend the Criteria authority to which they are not otherwise entitled.[36] The Criteria were not developed in a serious manner and were never intended to have the effect of law. Thus, attempts to bootstrap the Criteria to the regulation must fail.

"The basic policy of [5 U.S.C. Sec. 553] at least requires that when a proposed regulation of general applicability has substantial impact . . ., notice and opportunity for comment should first be provided." *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). The Criteria, if given the status suggested by private plaintiffs and the Califano and LDF Groups, would have substantial impact because they affect states' rights and obligations

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(Footnote 35 continued)

Internal memoranda of HEW indicate that the HEW developers of the Criteria sought to avoid the requirements of the FACA. Richard Cotton, an aide to Peter Libassi, the General Counsel of HEW who directed the work on the Criteria, wrote in an April 1977 memorandum attaching a proposed list of panel members, "if we meet with these people once or twice, can we avoid the Federal Advisory Committee Act?" *See* Memorandum from Richard Cotton to Peter Libassi, dated Apr. 11, 1977 (Appendix at 95a-96a). In the absence of compliance with FACA, the blue ribbon panel's influence on the Criteria resulted in prejudice to affected states because they were not provided an opportunity to render their views to the panel, nor were they able to obtain any knowledge of the panel's views.

[36] In this regard, the private petitioners and the LDF Group reference *Lau v. Nichols*, 414 U.S. 563 (1974). Their reliance on *Lau* is misplaced. *Lau* addressed the problem of English language deficiency in Chinese speaking elementary and secondary school children. As Justice Douglas noted, "[i]t seems obvious" that the failure to teach English to non-English speaking Chinese Americans "denie[d] them a meaningful opportunity to participate in the educational program . . . ." *Id.* at 568. Nothing about defining the legal standard applicable to desegregation of higher education is obvious.

Moreover, the *Lau* guidelines were clear and uncomplicated, filling fewer than two full columns, covering less than one page of the Federal Register and consisting of only ten paragraphs. *See Identification Of Discrimination And Denial Of Services On The Basis Of National Origin*, 35 Fed. Reg. 11,595 (1970). In stark contrast, the Revised Criteria are set forth in seventeen columns, cover nearly six full pages of the Federal Register and consist of 106 paragraphs. *See* 42 Fed. Reg. 6,658.

relating to Title VI compliance and endanger the flow of federal money critical to the existence of state universities. The Criteria, if so interpreted, must comport with the rule-making requirements of the APA. *See Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974) (parole board guidelines affecting substantive rights of persons were not general statements of policy and, consequently, were stricken for failing to be promulgated in accordance with APA).

Courts that have considered the effect of the Criteria have declined to bind states and the Government to them. When faced with the issue of the Criteria's application to proposed desegregation plans, the United States District Court for the Eastern District of North Carolina found that Judge Pratt had neither adopted the Criteria nor held that they have the force or effect of law. *See North Carolina v. Dept. of Health, Education & Welfare*, 480 F. Supp. 929, 932 n.1 (E.D. N.C. 1979).

Moreover, the United States Court of Appeals for the District of Columbia has held:

> When the court ordered the Department [HEW] to enforce [Title VI] in 1973, it did not purport to dictate a fixed formula for choosing among these modes of implementation, *i.e.*, it did not dictate specific compliance criteria but left the choice among lawful criteria to the discretion of the Department and of the states. [Footnote omitted] Similarly, the particular terms of the amended criteria issued by the Department pursuant to the 1977 District of Columbia District Court order were never endorsed or compelled by the district court [footnote omitted]; and indeed have been subsequently revoked by the Department. [Footnote omitted] Thus, the point of his various court orders, as Judge Pratt explained, was not to specify what the final results of enforcement would be in every detail, nor to decree unalterable requirements for compliance with Title VI, but rather to have the Department initiate the process of enforcement, the process of which the specifics of compliance would then be determined. [Footnote omitted]

Adams v. Bell, 711 F.2d 161, 165-166 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984). Thus, the federal courts that have considered

the significance of the Criteria have confirmed their purpose as mere guidelines. The Criteria serve as guidelines to the development of desegregation plans; they do not impose "unalterable requirements" which can be converted into a standard of liability under Title VI and the fourteenth amendment.[37]

B. The Origins Of The Criteria Are Suspect.

In determining the weight to be accorded the Criteria, the Court should also consider their questionable genesis. In addition to HEW's efforts to shield the development of the Criteria from public view, *see* footnote 35, *supra* at 25-26, testimony in a prior higher education desegregation case discloses that the so-called "blue ribbon panel" organized by HEW to comment on the Criteria was a mere formality and little, if any, substantive work was actually performed by the panel. A member of that panel, Harold Howe, II, a former United States Commissioner for Education, and at the time of the panel a vice-president of the Ford Foundation, testified just three years after the panel was convened that he had no recollection of what occurred during the panel's meetings.[38] Howe Testimony at 2788, *In re North Carolina*, HEW Docket 79-VI-1 (dated Aug. 13, 1980) (Appendix at 93a). Mr. Howe stated:

> I apparently had been at a meeting of that group and apparently that was it, but I could not recall any details of the meeting. It did not make a great impression on me, quite clearly.
>
> * * *

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[37] To the extent that the Criteria seek to advance institutional rather than individual rights, they proceed beyond the legitimate scope of Title VI. *See United States v. Alabama*, 791 F.2d 1450, 1456 (11th Cir. 1986), *reh'g denied*, 796 F.2d 1478 (11th Cir.), *cert. denied sub nom. Board of Trustees v. Ala. Bd. of Educ.*, 479 U.S. 1085 (1987). *See also* discussion *supra* at 10 n.10; Testimony of Sheldon E. Steinbach, *infra* at 29-30.

[38] Mr. Howe testified on August 13, 1980, in an HEW administrative proceeding involving allegations of higher education discrimination in North Carolina. According to Mr. Howe, the blue ribbon panel met in January 1977, *see* Howe Testimony at 2787-88 (Appendix at 93a); the panel's one meeting actually took place in June 1977.

> And it doesn't surprise me that I forgot the affair, but I regret that I did, and I can't give much more report than that about it.
>
> * * *
>
> I really don't have any solid recollection that would be useful.
>
> * * *
>
> And then Joe [Califano] – and I think maybe Joe was being supercilious, because he had heard I had forgotten the meeting.
>
> In any event, he did say, "You did a great job for me, Doc, on that blue ribbon panel," as he got in the elevator. And that's all I can tell you; I made no response.

Id. at 2788-90 (Appendix at 93a-94a).

Mr. Howe's complete lack of recall regarding the development of the Criteria is not surprising in that the meeting of the blue ribbon panel lasted little more than two hours, had no set agenda, and was essentially a loose discussion of various topics. Indeed, in response to deposition questions by Government attorney Jeffrey Champagne, panel member Sheldon E. Steinbach, who at the time of the panel was General Counsel of the American Council on Education, described the meeting:

> There seemed to be . . . a uniformity of views expressed by people with expertise and a self-interest in predominantly black institutions of higher education. The white members of that panel from the best of my recollection were remarkably quiet during most of the discussion that afternoon.
>
> * * *
>
> There seemed to be general agreement and a majority of the time spent once Mr. Califano walked into the room, after he made his presence . . . with the benefits to [the] black community in general in preserving the traditionally black institutions of higher – public black institutions of higher education.
>
> * * *

> My recollection it [the meeting] started at 2 o'clock, around 2 o'clock; ended at about 4:30, 4:45, possibly a little earlier, 4:15.
>
> * * *
>
> Following [the early part of the session] there was . . . a substantial discussion of the merits and value to the black community of maintaining these institutions. There then followed a reasonably lengthy discussion of the inequality of allocation of resources to the black institutions. That took up a major portion of the time.
>
> * * *
>
> There was certainly no written material passed out. To the best of my knowledge there was no agenda placed before us and from the face of the invitational letter, as I recall it, and from what actually occurred, it was a far-reaching discussion of a variety of things which happened to come to people's minds.

Deposition of Sheldon E. Steinbach at 10-16, *In re North Carolina*, HEW Docket 79-VI-1 (dated June 5, 1980) (Appendix at 99a-102a).

Mr. Howe's lack of recall regarding the development of the Criteria, and Mr. Steinbach's description of the blue ribbon panel combined with HEW's successful efforts to violate the ACA, reveal that private petitioners, the Califano Group and the LDF Group are ascribing to the Criteria a far more serious and formal character than that contemplated by the participants on the reviewing panel and by HEW itself. The Califano Group should not now be permitted to rewrite history and to mislead this Court into binding the affected states to Criteria which were intentionally developed in the dark by bureaucrats seeking to advance their own uninformed theories of higher education desegregation.

CONCLUSION

For the foregoing reasons, Amici support the respondents' request that the decision of the Fifth Circuit be affirmed.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,

Petitioner

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, *ET AL.*,

Respondents.

JAKE AYERS, SR., *ET AL.*,

Petitioners

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Appendix To Brief Amici Curiae Of Charles E. "Buddy" Roemer, III, Governor Of The State Of Louisiana, Board Of Regents Of The State Of Louisiana, And Board Of Supervisors Of Louisiana State University And Agricultural And Mechanical College In Support Of Respondents

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COMMENTARY

The Virginia-Pilot
THE LEDGER-STAR
12/10/78

DAVID TATEL: HEW's
VOICE IN COLLEGE CRISIS

David S. Tatel, 38, is the director of the Office for Civil Rights of the U.S. Department of Health, Education, and Welfare. He is responsible for federal civil rights policy involving minorities and the handicapped.

OCR oversees compliance with the desegregation rulings of the federal courts in a nine-year-old case generally known today as Adams vs. Califano, involved are federal efforts to desegregate state-operated colleges and universities in six Southern states, including Virginia and North Carolina.

The case in Virginia has reached a critical stage in which Tatel and his immediate superior, HEW Secretary Joseph A. Califano have threatened to begin to cut off the flow of federal money if duplication of nine programs is not ended at predominantly black Norfolk State College and predominantly white Old Dominion University. The deadline is Jan. 6. A similar situation is developing in North Carolina.

For the last two years, Tatel has been one of the most inaccessible of federal officials. The following interview, conducted in Tatel's Washington office Nov. 29 with Virginia-Pilot education writer Jeff Brown, is the first extensive public comment by Tatel on the Virginia desegregation crisis.

Q & A

Brown: I want to start out just talking about desegregation in general in 1978. What is the purpose of desegregation now? It seems to me that years ago the purpose was to break down laws that were obviously intended to segregate. How has that changed?

Tatel: The courts have established two requirements in the desegregation process. The first is to eliminate the actual discriminatory conduct. In Virginia and these other states, that's the law,

state law, that required blacks to go to black schools and whites to go to white schools.

The second part of the requirement is to eliminate the vestiges of the dual system. That is, the effects of the past discrimination. That's what we're dealing with now. What the courts have said is that many of those effects still remain in the form of systems of higher education that have a large number of predominantly white schools and several predominantly black schools. There are other effects that the courts have found. Like, for example, that the schools that were the black schools in the former dual system are underfunded, have inadequate resources, inadequate physical plants, that the percentage of blacks graduating from the high schools in this state and entering the state colleges are lower than the percentage of whites

Q. Is there any sense of how long a process this is going to take?

A. Well, it should have been over years ago.... The plans we're now negotiating are five-year plans. And we think that if the plans are acceptable and if the states fulfill their commitments the process should be over in five years.

Q. In Norfolk the people, the blacks at Norfolk State, are * * * that the duplication of programs be dropped. Who is being helped if the blacks are opposing this?

A. Well, remember now, we're not talking about dropping programs; we're talking about two things for the blacks school. One, giving it new programs, which the state has already agreed to do. And secondly, giving it essentially a monopoly in the Tidewater area on some of the duplicated courses it now offers.

So although it can drop one course it will be given the monopoly on another course, which would presumably be larger as a result. So, as a result, the institution's strengthened and desegregated. And that's the purpose of the whole process.

Q. Why push so hard to do that if the blacks are opposed to it?

A. I don't believe that blacks are opposed to it, if it's done properly. Remember, the lawsuit that we're acting under was brought by a black organization. Most of the black leaders I've spoken to support the effort.

Q. Locally or nationally?

A. Both. And you saw the NAACP director in the Tidewater area supports the effort. The purpose of it is to desegregate the institutions. And I'm convinced if it's done properly both white and black educators will support the process.

Q. Do you think the fear at the black institutions is partly due to the history that whenever something has been taken it's never been replaced adequately? Is there more assurance now that will guarantee that something will not be taken away and a vacuum left?

A. * * * institutions have a legitimate reason to be worried. When elementary and secondary schools were desegregated it was the blacks who lost their jobs. The black teachers and the black administrators. And the plans we're negotiating with the states insure that if there is going to be a reduction, which nobody would expect – I mean there is no reason for it – that it would be done nondiscriminatorily. The plans have lots of protections for black administrators and black teachers. And the whole purpose of these plans is to protect black institutions.

[Picture Omitted in Printing]

Q. Blacks have talked about the need to keep the black school primarily black as part of the effort to retain the black identity. There was a story in the Chronicle of Higher Education this week about a predominantly black school in Florida where they're worried that the white enrollment is going to increase to such a point that it's going to dilute the character of the place. What is the place of black identity in an institution, and what in your mind does the black identity mean when that term is used?

A. Well, what it means to us is the preservation of the institution. As an integrated institution you can preserve the white identity of a white institution and still have it integrated. And there's no logical reason why you shouldn't be able to preserve the identity of a black institution and have it integrated. This is not a racial-balance law that we're applying. We're not insisting, and probably there never will be, blacks and whites evenly distributed in every institution in the state.

Q. Is that a goal?

A. No, it's not. That's what I said. This is not a racial balance thing. The purpose of it is to have enough blacks attending the white schools and enough whites attending the black schools so that we can conclude they are in fact integrated.

Q. Is there any evidence beyond the discrepancy in enrollment of the two institutions that there is discrimination in admissions policies?

A. Discrimination now?

Q. Now.

A. No. All we're talking about, and this has been made clear all along, is the effects of past discrimination, that is the former state laws that limited attendance to these institutions on the basis of race, and that effect has continued into the 1970s.

Q. Blacks like Harrison Wilson, president of Norfolk State, argue that that point of view indicates that Office for Civil Rights is out of touch with the present feeling in the black community. His argument is that though the historical reasons for Norfolk State's founding were wrong the present situation is not and that historical reasons aren't relevant to the present situation.

A. Well, they are relevant. The courts have told us they're relevant. We're dealing with a system of higher education that was once segregated. Brown vs. Board of Education (the 1954 Supreme Court ruling that struck down the separate-but-equal principle of public schooling) requires that it be segregated. And that's the overriding concern. We're only dealing with public black colleges. We are not talking about the probably 100 or 150 private black schools throughout the country that aren't affected by this. But these public black institutions are under the same obligation to desegregate as are the white institutions that are members of the same system.

Q. If these two schools comply within the next month or so and each drops some programs to eliminate the duplication is there any guarantee that the plaintiffs won't reactivate the case or that Office for Civil Rights won't come back with some other requirement?

A. There's no guarantee that the plaintiffs won't challenge the plans but there is a guarantee, that if we accept the plan we'll defend it with the state. And I mean what happened a few years ago where

the department did not defend the plan will not happen. If we accept them, we'll defend them. But I can't guarantee that the plaintiffs won't challenge them.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA, *et al.*

Testimony of CLIFTON F. CONRAD, taken on Monday, February 6, 1989, before Michael L. Turney, Certified Shorthand Reporter in and for the State of Louisiana, at the office of Taylor, Porter, Brooks & Phillips, Attorneys at Law, 451 Florida Boulevard, 8th Floor, Baton Rouge, Louisiana.

* * *

[303] student body is racially identifiable?

A. Again, we talked about figures the other day of 20 and 30 percent having been used frequently in the courts, 30 or so. I think once an institution hits 25 or so, 25 to 30 percent, that it's not racially identifiable, in general.

Q. So for predominantly black institutions that achieve a racial composition of 25 or 30 percent white, you would consider those no longer to be racially identifiable, if that's what I understand your testimony to be.

A. Yes. Yes, sir.

Q. And for predominantly white institutions, when are they no longer racially identifiable?

A. The same.

Q. The same?

A. Yes.

Q. Do you know of any place, Dr. Conrad, where program transfer has proved successful in increasing other-race presence?

A. Well, there have been some

* * *

[313] Louisiana?

A. Well, I judged everything against an overarching criteria, and that was: To what extent would a given act contribute or diminish advancement toward integration? And that was the benchmark against which I would look at, for example: Should PBIs be closed, or should several PWIs be closed?

And against that criterion I didn't think that – well, I did consider, to be perfectly honest, that closing some institutions, black and white, might help to advance integration. In all instances I thought that the cost, nonpecuniary as well as pecuniary, would be very substantial, and, hence, not worth the closure.

Q. Isn't it true, Dr. Conrad, that the most intractable problem in Louisiana and all of the stays [sic] which have publicly [sic] predominantly black institutions that the most intractable problem is increasing white presence in those institutions? That is much more intractable than introducing black students to predominantly white institutions?

[314]A. Well, I think you can infer that from my report, yes.

Q. Well, is it true, or not?

A. It's a very difficult problem.

Q. Isn't it true, Dr. Conrad, that it is a much more difficult problem to get white students into predominantly black institutions than black students into predevelopmently white institutions?

A. Yes.

Q. So would not the closing of the predominantly black institutions free up both, under some method that I'm sure all of you people in higher education provides, without grandfather provisions and other kinds of provisions, free up a significant number of present and future black students to make significant inroads into the increased minority presence of black students in higher education and on the white campuses in Louisiana?

A. Yes. Yes, I did.

Q. And then your most intractable problem is –

A. As well as the vice versa.

[315]Q. Then your most intractable problem would disappear, would it not?

A. Yes. There would be – largely dissipated.

Q. During your several hours of discussions with Mr. Jefferson in Washington, did you discuss with him the possible remedy of the closing of the predominantly black institutions to achieve desegregation in Louisiana as a topic of discussion with Mr. Jefferson?

A. Generally speaking, we talked about what I felt about different remedies, yes.

Q. Did you discuss that remedy in particular?

A. The closing of the back institutions?

Q. Yes, sir.

A. No, I don't think I discussed it with him.

Q. Have you ever discussed it with Mr. Jefferson?

A. No.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

VOLUME I

DEPOSITION OF DR. ROBERT B. GEX, 7533 Oak Street, New Orleans, Louisiana 70118, taken before Cindy K. Tregre, Certified Shorthand Reporter in and for the State of Louisiana, taken in the Law Offices of Jefferson, Bryan, Gray, Jupiter & Blanson, Suite 1850, 650 Poydras Street, New Orleans, Louisiana, commencing on Thursday, the 16th day of February, 1989.

APPEARANCES:

Representing the United States of America:

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BRONFIN, HELLER, STEINBERG
& BERINS
Attorneys at Law

BY: JULIA S. MANDALA
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* * *

[20] Q. In 1972 what was the racial composition of the faculty in the evening college?

A. I would imagine – I don't know exactly but I would imagine about 60 percent Black and approximately 40 percent White.

Q. Okay. What was the racial composition of the adjunct professors to the best of your recollection?

A. I would imagine approximately the same, but I really don't know.

Q. Okay. What was the racial composition of the faculty as a whole in 1984 in the Evening and Weekend College at SUNO?

A. I don't know but I would assume that it would have been approximately 60 percent Black and approximately 40 percent White.

Q. So it didn't change over a – from 1972 to 1984?

A. Well, the numbers changed but the percentages would not have changed [21] very much.

Q Okay. What was the racial composition of those faculty members who were adjunct professors in the college in 1984?

A. I don't know, but I would assume that again the adjunct professors were probably around 30 to 40 percent White and 60 to 70 percent Black.

Q. Was part of your job as dean or as an administrator we'll say, because I think you said you had other titles besides dean, as administrator was part of your job responsibility the recruitment of faculty members?

A. Yes, it was.

Q. Did you as dean make any efforts specifically directed during that time period toward the recruitments of other race faculty members?

A. If by that question you mean did I set out to recruit White faculty members?

[22] A. That's what I mean, yes, sir.

A. (Shaking head negatively).

Q. No?

A. No, I didn't, but the fact of the matter is we were always looking for the best qualified faculty we could find. We had a number—generally we did not have to go out and recruit faculty. They generally came in to inquire about positions, availability of positions and we had them fill out a teacher application form which we kept on file and we could go to that file and bring those people in as necessary.

Q. Was it your testimony that as dean you were satisfied with the racial composition of the faculty during that time?

A. To be absolutely honest, I wasn't concerned with the racial composition of the faculty at that time. I was only concerned with having the best faculty I could recruit and I [23] really was not concerned with any particular numbers of Black faculty or White faculty.

Q. Okay. 1984 to 1987 I see from your response to Question Number 2 you served as associate vice chancellor for academic affairs at Southern University in New Orleans; is that correct?

A. Yes, sir.

Q. Could you describe your job responsibility for me in that capacity.

A. Okay. I was basically the assistant to the vice chancellor for academic affairs, and was responsible for the same duties he was responsible for in his absence; however, I had certain responsibilities delegated to me and that was schedule making, overseeing the general programs of the university, academic programs of the university, serving on certain committees as the representative of the vice chancellor of academic affairs [24] such as the curriculum committee among others. In general, whatever duties and responsibilities he delegated to me.

Q. And from 1987 to November of 1988 I see from your response to Question Number 2 in your report you served as vice chancellor for academic affairs; is that correct?

A. That's correct, yes, sir.

Q. Could you tell me about your job as vice chancellor of academic affairs?

A. Sir, the responsibility was all encompassing for the academic programs of the university. That was – and that included registration, the library, the program quality on the various programs, having – setting up programs for accreditation, visits, just any number of things, yes.

Q. Did you have any responsibility in your capacity as vice chancellor for other race recruitment, other race student recruitment?

[25] A. Specifically, no..

Q. What do you mean by specifically?

A. What I mean is that there was – at that time under the Consent Decree there was an office that was set up called the other race recruiter that was part of our high school relations, recruitment efforts.

Q. Yes, sir.

A. And that did not come under the purview of the vice chancellor, et cetera.

Q. Whose purview did that come under?

A. I guess under the office of student affairs. I really don't remember.

Q. Okay. And since December 1, 1988, you've been the interim chancellor at SUNO; is that correct?

A. Yes, sir.

Q. Okay. Would it be fair to say from 1972 to the present time you've been a part of the administration at [26] Southern University in New Orleans?

A. Yes, I guess that would be a fair statement.

Q. Okay. Would you describe for me, if you would, sir, the efforts during that period as best you know them of the administration at SUNO in terms of other race, i.e., White student recruitment?

A. As far as I know the other race student recruitment was done primarily by the high school relations office and specifically the other race recruiter, and since I was not responsible for either directing or overseeing any of his efforts I'm not really sure what that entailed. However, during – as far as – to the best of my knowledge what it did entail was while some other high school members of the high school

relations office might have recruited students, made visits in predominantly Black schools, the other race recruiter had the responsibility for attempting to do [27] the same thing in predominantly White schools, and was responsible and had the responsibility – and I don't know whether there were any quotas set for him by the administration other than the ones that were set in the Consent Decree itself as to the number of other race students he was expected to recruit.

Q. Okay. Well, do you know what measures other than recruiting at high schools at that time were taken, once again while you were part of the administration at SUNO, to increase the White enrollment at SUNO?

A. I do know that there were a number of displays put in – answer desks and so forth put in the malls of certain shopping centers.

Q. Yes, sir.

A. There were efforts made through ACT lists that would come out that letters were sent to attempt to recruit other race students. I do know that there was a distinct effort made [28] to involve faculty members along – on these trips to the high schools to recruit other race students, but specifically other than those general things, I don't know what the results of those were.

Q. Okay. In you job as interim chancellor, have you ever had occasion to inquire into what those efforts were and how successful they were?

A. No, sir.

Q. Is there a reason for your not inquiring?

A. Well, all I can tell you is I had no reason to inquire. The question never came up.

Q. Could you describe to me, if you would, sir, once again from your perspective as an administrator beginning in 1972 at SUNO the efforts that were made by the administration at SUNO to recruit other race, i.e. White faculty members?

A. I really do not feel qualified to answer that question [29] because while I was a member of the administration – of as you put it the administration, there were other levels and other administrators

who had that responsibility. It was not mine until I moved into the office of the associate vice chancellor for academic affairs.

Q. Uh-huh (affirmative response) .

A. And in that case, I can – so that I cannot speak to what, quote, unquote, the administration of SUNO was doing from '72 to '84 to recruit White faculty. Now if you'd like –

Q. I'm sorry. I thought you were through.

A. If you'd like me to answer after '84, I can tell you that we – whenever vacancies occurred, we had the list of available White faculty from the – is it the SERB [sic] or one of the agencies, some state clearing house agency and we made every effort to recruit White faculty from that list. [30] But we have never had a problem recruiting White faculty. The fact of the matter is I think by whatever definition we might consider a faculty to be integrated we certainly would meet that. I think we have approximately 30 to 35 percent, maybe even higher White faculty on our campus at this time.

Q. And how long have you had that racial composition among your faculty?

A. Oh, I suspect as far as I was aware of numbers being kept in that – for the day school faculty I have not – was not involved in that prior to '84, and even though I was a member of the administration –

Q. Yes, sir.

A. – from '72 to '84, I was dealing primarily with the evening college and was not involved in the recruitment of White faculty for either – for the day school or White students for the day school.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

VOLUME II

CONTINUATION OF THE DEPOSITION OF DR. DOLORES R. SPIKES, 1315 Balsam Avenue, Baton Rouge, Louisiana 70807, taken before Cindy K. Tregre, Certified Shorthand Reporter in and for the State of Louisiana, taken in the Law Offices of Bronfin, Heller, Steinberg & Berins, Suite 2500, 650 Poydras Street, New Orleans, Louisiana, commencing on Tuesday, the 28th day of February, 1989.

APPEARANCES:

Representing the United States of America:

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Washington, D.C. 20530

* * *

[79] possibility I don't know. It just seems that it ought to that it would reach whatever magnitude the court would desire.

Q. Well, Let's not talk about the magnitude the court would desire for a moment. Let's approach it a little differently.

A. All right.

Q. Let me ask you as an educator do you have an opinion as to what percentage of White students at Southern University at Baton Rouge, as to what percentage would constitute a White presence on

that campus that would result in the kind of educational benefits that one would expect from integration?

A. I think that over a period of time, I don't think there's going to be instant integration by any of these means, I think that over a period of time we could reasonably expect somewhere between 20 to 30 percent White students on the Black colleges – [80] college campuses, and I –

Q. What period –

A. I may be talking about somewhere around 15 to 20 years' time for that to occur.

Q. And do you think that that level of desegregation, not in terms of a legal standard but in terms of an educational standard would be –

A. In terms of an educational standard?

Q. Yes, ma'am.

A. Yes, I think so.

Q. Do you have a view as an educational matter, not as a legal matter, as to what an adequate percentage of Black students would be at the predominantly White institutions?

A. I think we've looked at the initial figures somewhere which have shown that you may expect, given the number of White institutions in the state, the pool from which to draw that one could reasonably – depending upon [81] the location of the institution, expect from – anywhere from 15 percent Black on up to something even greater in the New Orleans area I guess, but I think as a minimum somewhere around 15 percent.

Q. I take it, Dr. Spikes, and correct me if I'm wrong, that you've never been involved in the transfer of an academic program; is that correct, from one institution to another?

A. That's correct.

Q. You note at Page 20 of your report for fall semester 1988 40 other race students applied for academic scholarships and that only 17 could be awarded because of limited funds. Did you – in fall of 1988 did you expend all the money available to you at Southern University for other race scholarships?

A. As far as I recollect, yes.

Q. When you call it other race academic scholarships was there any – are these scholarships awarded strictly

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CV479-251

MARSHA ARTIS, *et al.*,

Plaintiffs

vs.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*,

Defendants

ORDER

[Filed Feb. 2, 1981]

This case is before the Court pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes. Suit was originally filed August 7, 1979, claiming that the defendant Board of Regents operated a dual system of public colleges in Savannah, Georgia, in violation of the Fourteenth Amendment. Plaintiffs then sought a preliminary injunction to stop implementation of a limited desegregation plan which had been approved by the Department of Health, Education and Welfare, so that a complete merger of the two institutions, Savannah State College (SSC) and Armstrong State College (ASC), could be achieved. A hearing was held on this injunction August 24, 1979. At this hearing plaintiffs announced dismissal of HEW as a party defendant. Evidence on the racial history and composition of the two institutions was also received.

After review of this evidence, the Court concluded in its Order of September 4, 1979, that plaintiffs had failed to demonstrate either irreparable injury or a substantial balance of harms in their favor. Accordingly, plaintiffs' motion was denied.

Subsequently, this Court has entertained additional evidence and argument particularly at a bench trial held November 12, 1980. At this proceeding, plaintiffs indicated that they had abandoned their demand

for a complete merger of SSC and ASC. Instead, plaintiffs argued that this Court should promote desegregation of both schools by requiring a total end to duplication in their program offerings. Plaintiffs also argued that this remedy was demanded by the apparent failure of the HEW plan to achieve its objectives. This plan centralized all business administration courses at SSC and education courses at ASC.

After careful consideration of available evidence and argument, I have concluded that there has been no showing that the current racial composition of the two institutions is the result of constitutional violations by the defendants and not the individual choices of students. In view of this determination, the Court finds that no basis exists for ordering any of the relief here sought. The Court further concludes that, even if certain actions of the defendants did violate constitutional mandates, these actions have had only minimal impact on racial balance at the two schools and have been adequately remedied by the defendants' more recent policies. The reasons for these determinations are developed more fully in the following materials, denominated Findings of Fact and Conclusions of Law. However, should the content of any item be at odds with its classification, content shall be controlling.

Findings of Fact[1]

1. Armstrong State College and Savannah State College are four-year institutions operated by the defendant Board of Regents in Chatham County, Georgia.

2. SSC was originally named Georgia State Industrial College for colored youths. It was created by the Georgia General Assembly on November 26, 1890 for purposes suggested by its name. The University of Georgia and the School for Colored Students jointly operated the school initially in Athens, Georgia. In 1891, it was moved to its present site in Thunderbolt, Chatham County, Georgia. In 1932, the college was renamed Georgia State College and incorporated

[1]Finding of Fact 1-7 are drawn largely from the Court's Order of September 4, 1979. This Order was, of course, based upon evidence placed before the Court at the August 24, 1979 hearing. The remaining portions are based on materials and testimony from the bench trial conducted November 12, 1980. However, in any event, there is little dispute as to facts in this case.

under the Board of Regents of the University System of Georgia. It was again renamed in 1950, when it became Savannah State College.

3. SSC has remained predominantly black throughout its history. The mean enrollment (full and parttime students) for the 1978-79 academic year was 1,949 students. Of these, 1,813 (93%) were black. More recent statistics reflect a higher percentage of white and foreign students, but blacks still constitute about 88% of SSC enrollment.

4. Armstrong State College was first opened in 1935 as a junior college. The City of Savannah operated the institution until 1959 when it became a part of the University System of Georgia. ASC was elevated to four-year status by the Board of Regents in 1964.

5. Armstrong has been and remains today, a predominantly white college. No blacks were admitted until 1963. Average quarterly enrollment in the 1978-79 academic year was 2,895 students, of which about 87% were white. The most recent statistics available to the Court indicate that white enrollment is over 83%.

6. In July, 1977, HEW informed the defendant Regents that a desegregation plan accepted in 1974 had been rejected by the District Court of the District of Columbia. *Adams v. Califano*, 430 F. Supp. 118 (1977). Responding to this development, HEW defined new criteria for desegregation of higher education in Georgia as well as several other states. These criteria emphasized (1) use of comprehensive, coordinated statewide plans, (2) development of specific funding commitments and project goals and (3) avoidance of any reduction in blacks' educational opportunities or the status of black colleges. In addition, the revised HEW criteria emphasized elimination of unnecessary duplicative programs among black and white institutions; giving black institutions priority in placement of new degree program; and increased black utilization of higher education in the affected states.

7. In response to these criteria, the Board of Regents developed a revised desegregation plan for ASC and SSC. This plan was submitted to HEW on October 19, 1978, and approved by it in February, 1979. Under its provisions, ASC and SSC are expected to set up a joint continuing education program for the local population. The plan also calls for elimination of duplicative courses by centralization of the business administration program at SSC, and a similar transfer of all

teacher education courses to ASC. In conjunction with these changes, the plan provides for faculty transfers, maintenance of existing funding levels and student scholarships, and free shuttle bussing between the two institutions. The plan provides further for enhancement of SSC by addition of several new degree programs and substantial capital expenditures to improve the physical plant.

8. This plan is only one of many efforts made at least since 1971 to change the clear racial identities of the two institutions. Joint degree programs were first discussed in 1969 and in fact initiated in 1971. SSC has taken special steps to recruit white faculty. Attempts have also been made to integrate graduate programs. These efforts have occurred through the active cooperation of administrators at the two institutions. There has been no evidence presented which suggests resistance to these steps at either institution. There has been no evidence that any student has been denied access to either institution on grounds of race, at least since the middle 1960s.

9. It is apparent from the statistics on racial composition presented above that the joint efforts of SSC and ASC officials had comparatively little impact on the nature of the two institutions. Testimony presented at trial confirmed that both institutions remain clearly identifiable racially and that neither appears likely to achieve substantial racial balance in the foreseeable future. This conclusion may be particularly applicable where program duplication allows students to choose on both racial and educational grounds. But, in all events, projections under the HEW plan for increased minority enrollment are not being met. Even when duplication has been ended, most students have not chosen to follow their educational interests to a school where they would be in a racial minority. See CL 5.

10. The lack of change in the racial identities of ASC and SSC may be due in some part to the establishment of duplicative programs, notably in social work and criminal justice at the two institutions. Similarly, racially-based decisions by students may be facilitated by the availability of Georgia Southern College (GSC) which is predominantly white and only about sixty miles from Savannah.

However, it appears that the defendants have made substantial efforts to defeat any segregative impact of the existence of duplicative programs. As preparatory steps to eventual merger of the two institu-

tions, joint programs have been developed between the two colleges in a number of areas including criminal justice and social work. Furthermore, there is no reason to believe that any action taken with respect to GSC has been intended to do more than provide for actual increases in enrollment which have developed out of individual student choices.

11. The primary determinants of the racial character of ASC and SSC are the individual choices of potential students. These decisions are based upon factors such as peer pressure, family ties, as well as educational and athletic opportunities. As was noted above, these decisions are not easily changed by the actions of school officials or development of programs such as the HEW-mandated plan. In fact, Dr. Prince Jackson, former president of SSC and a witness for the plaintiffs at the preliminary injunction hearing testified as follows:

> [F]or students to go to a school in a true society (an integrated school) you have to reduce the number of choices that they have. The reason we have the black and white thing is because students do have choices so we have to reduce the number of choices that they have.

Tr. 44. Thus, the evidence is clear that the overwhelming reason for the racial imbalances plaintiffs complain of is the individual decisions of students who are, after all, free to attend or not attend college where and when they choose. It is not to be attributed to any active effort to create or maintain segregation by the defendants. It is not likely to be altered significantly by the steps plaintiffs seek or any measures which leave students free to "vote with their feet."

Conclusions of Law

1. This Court has jurisdiction over the present case pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes.

2. Where a state has maintained a dual system of education, it has a duty to "disestablish" this system "root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). However, before any judicial remedy may be imposed, a currently existing constitutional violation must be shown. In the absence of such a violation, no judicial remedy may be imposed. *Dayton Board of*

Education v. Brinkman, 433 U.S. 406, 419-420 (1977); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

3. The mere existence of racial imbalance, however pronounced, is not a constitutional violation. *Brinkman, supra*, at 413, 417. Furthermore, the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these official acts. *Armour v. Nix*, U.S.D.C., N.D.Ga., No. 16780, Order of September 24,1979, at 20-21.

In the present case, it appears that the overwhelming reason for continued racial imbalances at ASC and SSC is the free choice of students based upon a myriad of factors, some related to educational considerations, others of a wholly personal nature. FF 11.

4. There is authority for the proposition that, where present constitutional violations are found, a state must carry out a complete merger of institutions of higher learning. See *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd*, 597 F.2d 1056 (6th Cir. 1979). However, in this Circuit, a state's duty to "disestablish" segregated colleges has been defined in far narrower terms:

> Higher education is neither free nor compulsory. Students choose which, if any, institution they attend. In making that choice they face a full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few.

Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784, 788 (M.D. Ala. 1967), *aff'd 393 U.S.* 400 (1969).

> We conclude, therefore, that as long as the State and particular institutions are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantel the dual system on the college level, to the extent that the system may be based upon racial considerations, is satisfied.

289 F. Supp. at 789-790. Thus, the defendants in this case are at most chargeable with a duty to act in good faith with respect to operation

of ASC and SSC. They are not constitutionally required to take affirmative action to destroy the racial identities of the two institutions, even to the extent that they are chargeable with direct contribution to that imbalance.

5. Broad relief of the suit plaintiffs seek here cannot be based on any mere *de minimis* or cumulative constitutional violations. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977). The actions of the defendant must be a "substantial cause" of the segregation complained of. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974).

Under the facts now before the Court, it cannot be concluded that any action of the defendants since about 1965 has contributed substantially to racial imbalances at ASC and SSC. Even if racial intent is ascribed to establishment of social work and criminal justice programs at both institutions, the impact of these decisions would appear to be minor. Only seventy-three degrees in social work were conferred by Armstrong between 1972 and 1977. Of these, six went to blacks. Enrollment in the criminal justice program is apparently higher, but still less than 10% of students at the two schools are involved. Defendants' Exhibit 2, August 24, 1979 (letter of December 15, 1977 to HEW office for Civil Rights, at p. 15). Furthermore, the minority percentages in these programs appear to be about equal to that in the overall student populations. *Id.* Thus, it is difficult to see how either has added to segregation of these institutions.

It is similarly difficult to see how increased funding at GSC could have had any substantial impact on segregation at Armstrong and Savannah State. The appropriations plaintiffs point to concern only the 1980 fiscal year. Of course, the racial imbalances complained of are of much larger duration. Moreover, they have persisted for many years in which there is no claim that any action with respect to Georgia Southern was involved.

Furthermore, plaintiffs' own evidence suggests strongly that the presence or absence of duplicative programs has only modest impact on integration in any event. HEW projections indicated that the switch of business and education courses would bring approximately 500 blacks to ASC and 500 whites to SSC. In fact, plaintiffs conclude that only about 114 whites and 85 blacks transferred. Thus, plaintiffs acknowledge that over 80% of affected students simply went else-

where. It appears then that the defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here.

6. Even if the Court accepts *arguendo* the proposition that the Board of Regents have engaged in constitutional violations having substantial present effects, the actions of the defendants in adopting the HEW plan clearly meet the standards of good faith affirmative action discussed in *Alabama State Teachers Association, supra.* The desirability of eliminating duplicative programs has been accepted and the process, in fact, has begun. Cooperation between the institutions has developed. There is every likelihood that these policies will be pursued further in view of the quite effective financial pressure which HEW exerts over the defendants, if for no other reason. While this Court finds no constitutional violation which would support such measures, affirmative action in this context is certainly not impermissible. *Regents of the University System of California v. Bakke*, 438 U.S. 265 (1978). These steps clearly move SSC and ASC in precisely the direction plaintiffs here seek.

Discussion

This case presents the Court with several difficult questions of law and fact. There is as yet no settled answer to the problem of how much principles developed with respect to segregation in elementary and secondary education may be applied to colleges like Armstrong and Savannah State. Furthermore, the Court can find no easy method for determining the motivations of the defendants in their various official acts, many of which occurred years ago. Nor can the Court see any simple or definitive way to determine the basis for the educational choices of the many students whose conduct is the basic subject matter of this litigation.

However, based on the limited evidence and precedent available in this case, I have concluded that the overwhelming reason for the continued racial identities of ASC and SSC is the individual choice of students with respect to institutions which are neither free nor compulsory. Facts now before the Court suggest that official action has at best only limited impact on choices, which appear to reflect notions about the two schools that are of long standing and considerable

durability. The Court further concludes that the overwhelming weight of official action has been toward increasing, not retarding, "disestablishment." To the extent that limited opposite motives or impacts might be seen, it appears that there has been no substantial contribution to persistent racial imbalances at the two schools. Furthermore, it appears that the defendants have largely, if not completely, abandoned such policies and that they will continue to move in this direction in future years.

This Court is aware of the existence of contrary authority with respect to the legal duty of states which have maintained dual systems of higher education. See *Adams v. Richardson*, 356 F. Supp. 92 (D.C.D.C 1973), *aff'd* 480 F.2d 1156 (D.C.App. 1973). See also *Adams v. Califano*, 430 F. Supp. 118 (D.C.D.C. 1977); *Blanton, supra.* These cases apply concepts developed with respect to elementary and secondary directly to colleges, without reference to the many significant differences which *Alabama State Teacher's Association, supra,* finds determinative of the state's duty to "disestablish." In this case I have, of course, followed the *Alabama* reasoning. But, it should be re-emphasized that the plan in question was approved by HEW. Thus, there is no real, practical conflict in the direction to which the defendants are committed and the more demanding requirements of *Adams* which plaintiffs here seem to endorse. Furthermore, it is likely that the problems which plaintiffs point to in this plan will bring further attention from HEW (now HHS) and further responses from the defendants. The Court will look with interest upon these developments. But, under present law in the Fifth Circuit, I see no basis for the relief plaintiffs seek. Accordingly, the Court hereby orders that judgment be entered for the defendants.

So Order this 2 day of February, 1981.

/s/ [Illegible]
Judge
United States District Court
Southern District of Georgia

QUESTION: Has the merger of the University of Tennessee at Nashville (UTN) and Tennessee State University (TSU) been successful?

A Supplementary Report to the May 11, 1988 Report
(Also submitted herewith)

Prepared for the Board of Regents
of the
State of Louisiana

by
Wayne Brown
January 30, 1989
[WITHOUT ATTACHMENTS]

[2] INTRODUCTION

This report, dated January 30, 1989, should be considered as a supplementary report to the May 11, 1988 report prepared for the Board of Regents of the State of Louisiana. That report identified six basic conditions or criteria by which a successful merger of institutions of higher education should be measured, in the opinion of the author.

This supplementary report is organized as follows:

A. The method of analysis is outlined,

B. A brief general observation is presented,

C. Commentary supporting the general observation is presented, and

D. Supporting tables and documents, which supplement tables and documents contained within the May 11, 1988 report, are included.

[3] METHOD OF ANALYSIS

I. The definition, analyses, and summary observation contained-within the May 11, 1989 report were reviewed in their entirety.

II. No changes in the definition, including the six criteria, are deemed necessary.

III. Additional data pertaining to the fall of 1988 were obtained, and additional TSU enrollment items have been included within a new section labeled, "Document 15," which should be considered an addition to Volume 11, "Supporting Documents for Volume I," which was compiled on May 12, 1988.

IV. Additional analysis based upon data contained within Documents 15 as well as comparisons between data contained therein and data contained within the May 11, 1988 report is presented in this supplementary report.

V. Tables illustrating certain aspects of this most recent analysis are attached to this supplementary report.

VI. A brief general observation is presented on the following page, with additional commentary immediately succeeding the general observation.

[4] GENERAL OBSERVATION AND CONCLUSION

In spite of the provision of the resources previously available to both UTN and TSU, in spite of continuing special funding from the state to TSU, in spite of strenuous efforts on the part of the current president of TSU to relate the institution to both the white and black citizens of the greater Nashville area, TSU at present does not represent a successful merger according to the criteria listed in the May 11, 1988 report submitted herewith.

Specifically, criteria 3, 4, 5, and 6 still have not been met. (See commentary section of this supplementary report as well as the discussion of these specific criteria within the May 11, 1988 report.)

[5] ANALYSIS OF FALL 1988 DATA
(Including Comparisons with Previous Years)

Table 1 displays a comparison of headcount enrollments at TSU for the fall of 1987 and 1988. The data is displayed according to three general locations: main campus (the original TSU campus which includes dormitories and athletic facilities), the downtown campus (the former University of Tennessee at Nashville facility which includes no residences or athletics facilities), and a sum of all other off-campus locations.

Observation on Headcounts Enrollment: There was a slight overall increase in enrollment in the fall of 1988, and there were increases for black and white students, as well. The grand total of white students increased by 164 headcount compared with a grand total increase for black headcount of 158. There was an increase in enrollment of all races at the main campus (9.5%) but a decrease for all races at the downtown campus (4.9%). The slight change for enrollment for all other off-campus locations was not significant. In a conversation with the executive to the president of TSU on January 26, 1988, I was informed that the current strategy of TSU, which is reflected in the fall 1988 enrollment data, is to limit the downtown campus to two primary missions:

1. An evening school primarily aimed at working adults, and
2. The only location of upper division (junior and senior) business courses.

[5] Therefore, students must move between the two campuses in order to have enrollment in certain courses which are required for their graduation and which may occur only at one site.

Comparison of TSU Headcount Enrollments, Fall 1978 and Fall 1988:

Table 2 displays a comparison of the full-time equivalent enrollments at TSU by race in the falls of 1987 and 1988. This table reflects an increase in FTE enrollment for all races with the increase in white FTE enrollment slightly larger, as a percentage of the previous fall's enrollment, than for blacks.

Comparing data from Table 1 in this supplementary report with attachments 7 and 8 in the May 11, 1988 report reveals the following:

	Fall 1978*	Fall 1988
Black	5,259	5,649
White & Other Non Black	5,518	3,427
TOTAL	10,777**	9,076

* See Attachments 6 & 7 to May 11, 1988 report.

** In 1978 TSU had a total of 5,358 (4,454 black) and UTN had 5,419 (805 black).

Thus, even though there were slight increases in enrollment for black and white students in the fall 1988 when compared with the previous fall, TSU continues to serve substantially fewer students than was served in the fall of 1978 by TSU and UTN combined. In fact, through the fall of 1986 (eight years after the merger), TSU was serving fewer black as well as fewer white students than were served in 1978 by TSU and UTN. In the fall of 1987 (nine years after merger), TSU [7] finally began to serve as many blacks as the combined institutions served in 1978.

Observation Regarding Different Campuses of TSU:

Given the announced position of TSU regarding its plan of use for the downtown campus as an evening institution and as the location of all upper division business courses, it is difficult to determine whether the shifts between location from fall 1987 to fall 1988 are significant indicators of the overall progress toward desegregation. However, as revealed in Tables 3 and 4, there were no *dramatic* increases in the percentages of white students at TSU between 1987 and 1988. The federal court's expectation of having at least 50% of the student body be white is not being approached rapidly.

Further, since the downtown campus is now to be utilized principally in the same manner as was the original intent of UTN – i.e., an evening school for working adults – it is clear from Table 3 that TSU is serving only 52% as many students as were served by UTN in the fall 1978 at the same location (2,828 divided by 5,419).

Observation Regarding "White" Scholarship Program:

In the January 26 conversation with the executive to the president of TSU, I was informed that TSU provided in the fall of 1988, 319 full scholarships for white undergraduates. According to this official, 28.5% of the undergraduate white students who were enrolled in the fall for a full academic load were on full scholarships as funded by the State of Tennessee. According to my previous experience as an official of the State of Tennessee, the number of these scholarships over the [8] past few years can account for the majority of the recent growth in full time white undergraduate enrollment at TSU.

Observation Regarding TSU's ACT Scores:

Table 3 lists the average ACT composite score for entering students in the fall of 1983 at each of Tennessee's public universities. TSU remains well below any other state university as well as significantly below the average of all other Tennessee universities in this regard. However, there was a slight improvement over the fall of 1987 (fall 1988 – 14.1, fall 1987 – 13.4 [Document 9]). Furthermore, while ACT data for entering freshmen in Tennessee's community colleges and technical institutes were not available to the author on January 30, 1989, TSU's fall 1988 level of 14.1 was still below the average for all community colleges and technical institutes in Tennessee in 1987 (14.6 [Attachment 9]). This is significant because by state policy the community colleges and technical institutes are "open admission" schools, whereas all Tennessee public universities are expected to have some announced admissions standards. Thus, as measured by this one indicator, TSU is functioning at a significantly lower level than any other public university in Tennessee. From my experience as Executive Director of the Tennessee Higher Education Commission, it is clear that TSU has not regained many students of the academic ability level as were enrolled at UTN just prior to the merger. Unfortunately, state policy in 1978 did not require the release by public institutions of ACT data, and, therefore, no table showing such scores for any institution, including TSU and UTN, can be presented in this report. However, from other information available to me when I [9] served as a state official, it is my opinion that UTN was functioning in the period 1975-78 with a student body which would roughly

parallel the academic level of students currently enrolled at UT Martin (fall 1988 ACT average 17.9), if not UT Chattanooga (fall 1988 ACT average 19.8). This observation is further supported by my recent three years of service as Dean of The Jack C. Massey Graduate School of Business at Belmont College in Nashville. In this latter capacity, I am recruiting Nashville students, including working adults, for both an MBA degree and a BBA degree. These were the largest programs of UTN prior to the merger. From my relationship with business leaders whom we are encouraging to send employees to our private program with substantially higher tuition than that at TSU, I am convinced that many students who are of the academic ability to have been admitted to the University of Tennessee are not enrolling at TSU but rather are enrolling in other Nashville area institutions, including the one I now serve. (See Attachment 5 to May 11, 1988 report for pertinent enrollment information.)

Observation Regarding Graduation Rate:

Table 4 contains data previously reported in Document 11 and refers to a goal of increasing the percentage of students who earn baccalaureate degrees. The latest data shows a slight loss in the percentage of students who initially enrolled in TSU and who subsequently graduated from a Tennessee public university within six years (24.97% graduation rate for 1982-88 in comparison with 26.27% for 1981-87).

[10] TSU lost ground with respect to graduation rates in 1988. Further, TSU's graduation rate for the 1982-88 period (24.97%) was significantly lower than the average of all other Tennessee public universities (40.94%). By this measure alone, TSU is serving a practical function that is different from other state universities – i.e., 75% of the students who enrolled as first-time freshmen at TSU in 1982 did not graduate from TSU or any other public university in Tennessee within six years.

Table 5 displays certain standardized examination scores for graduating seniors at public universities. This data is part of a set of goals established by the Tennessee General Assembly. For the three years reported in Table 5, TSU's mean score on the ACT College Outcomes Measure Project has not improved, and even declined

slightly, and in any case is significantly below the score of any other public university in the state. Thus, TSU is admitting students with lower academic levels, is graduating a smaller percentage of those students, and is graduating students who score lower on exit examinations than any other public university in the state.

Observation From Reviewing TSU Annuals:

In my efforts to determine whether the merger has been a success, I have reviewed the recent TSU student annuals. It is clear that the annuals reflect TSU's historic black identity. While a few photographs of white students can be seen, the overwhelming majority of the students pictured in the class sections and virtually all of the students featured in student activities or in casual campus settings are black.

[11] From my experience as a state official and from my residence in the greater Nashville area since 1975, these observations taken from the annuals are consistent with the image which is portrayed by TSU. Were it not for the large number of white undergraduate scholarships, there would be a substantially lower white presence at TSU.

While it would be useful to have information concerning the racial composition of the residence halls at TSU, the institution is not required to report such information, and did not make such data available to me.

In conclusion, it is my opinion that based on the criteria set forth in the May 11, 1988 report, TSU does not represent a successful merger of institutions of higher education.

QUESTION: Has the Merger of the University of Tennessee at Nashville (UTN) and Tennessee State University (TSU) been successful?

A Report
Prepared for the Board of Regents
of the
State of Louisiana

by
Wayne Brown
May 11, 1988
[WITHOUT ATTACHMENTS]

[2] METHOD OF ANALYSIS

1. Definition of successful merger is stated. The definition includes six criteria.
2. Analysis based upon data obtained from the offices of the Tennessee State Higher Education Commission is presented with a conclusion regarding each of the six criteria of the definition.
3. Tables and attachments related to each element are attached.
4. A brief summary observation is presented.

[3] DEFINITION OF SUCCESSFUL MERGER OF INSTITUTIONS OF HIGHER EDUCATION

In general, a successful merger would be one in which the following conditions occur:

1. The mission of the merged institution includes the most important elements of the missions of the previous institutions.
2. The resources of the merged institution include those of the previous institutions.

3. The primary constituents of each of the previous institutions continue to be served by the merged institution at least as effectively as was the case prior to merger.

4. New constituents are served as needs arise.

5. The services and programs of the previous institutions are continued with at least the same level of quality as occurred prior to merger.

Further, in a particular case of merger whose purposes include the expectation of achieving additional desegregation, the following condition must be added:

6. The prescribed racial goal is attained.

[3] CRITERION 1: The Mission of the merged institution includes the most important elements of the missions of the previous institutions.

The court's order for merger in 1977 and the plan actually used to execute the merger by July 1, 1980 clearly established an "expanded" TSU with all of the mission elements of the two previous institutions. This mission was immediately recognized and accepted by the THEC, the legislative and executive branches of government as the new official mission of TSU.

CONCLUSION: Criterion 1 of the definition was met at the point of official merger (July 1, 1980).

[4] CRITERION 2: The Resources of the Merged Institution Include Those of the Previous Institutions.

The court accepted the Board of Regents' plan of merger which stipulated that, regardless of enrollment declines (which occurred after the merger), state operating appropriations to TSU should be no less than the sum of the pre-merger appropriations to UTN and TSU for the period of four fiscal years (1977-78 through 1980-81). This was supported by the THEC, executive and legislative branches. (See Attachment 1.)

At the end of that period, a special formula was developed by my office such that TSU's appropriations would not be reduced in accordance with strict formula rules if its enrollment continued to be less than the combined pre-merged UTN and TSU numbers. Under

this special plan, TSU would not receive less than the sum of the amount the formula (Attachment 2 for 1982-83 details) specified plus an amount equal to one-half the difference between the formula amount and the previous year's appropriation to TSU. This procedure was accepted by THEC, the executive and legislative branches.

Further, TSU received special and disproportionate capital recommendations from THEC, and the legislature, while not funding all of THEC's recommendations, has continued to fund TSU in a special way (Attachment 3).

In addition, the legislature provided other funding to TSU as shown on Attachment 4. These funds were beyond formula considerations.

[5] TSU was during my administration and continues to be the best funded university in Tennessee on a per student basis.

Finally, the merged institution was given by the court all the faculty, student and physical resources of the two previous institutions.

CONCLUSION: Criterion 2 of the definition was met.

[6] CRITERION 3: The primary constituents of each of the previous institutions continue to be served by the merged institution at least as effectively as was the case prior to merger.

Between 1979 and 1986 the following headcount enrollment trends occurred:

1. Statewide Tennessee private enrollment was stable (Att. 5).

2. The six Nashville private institutions offering some programs similar to TSU's had, as a group, stable enrollment, although two, Belmont and Trevecca, grew significantly (Att. 5).

3. Statewide public university enrollment declined 6.9%, TSU declined 36.8% from the pre-merger level, while two state institutions just outside Nashville (APSU and MTSU) gained 11.1% (Att. 6).

4. Statewide black public university enrollment (excluding the Nashville area) grew by 12.2%, TSU lost 15%, while

the two state institutions just outside Nashville gained 43.2% (Att. 7).

CONCLUSION: The merged institution has failed to meet Criterion 3 since it has lost significant enrollment (including losses in total, white and black categories). Two private institutions in Nashville and two public institutions just outside Nashville have gained enrollments.

[7] Criterion 4: New constituents are served as needs arise.

From data available to me, the following population trends occurred between 1980 and 1986:

1. Tennessee gained 4.6% (Att. 8).
2. The Nashville metropolitan area gained 9.4% (Att. 8).

Taking these growths together with the data listed in Attachments 5, 6 and 7, the following conclusion is drawn.

CONCLUSION: The merged TSU has not served new constituents' needs, but other institutions in the Nashville area have. These others include two private institutions with significantly higher tuition levels than TSU.

[8] CRITERION 5: The services and programs of the previous institutions are continued with at least the same level of quality as occurred prior to merger.

Complete historical data on quality measures were not available from the filed of the THEC at the time of this report. However, three particular studies were initiated during the 1980s, and the following facts were derived from these studies:

1. Among public universities in Tennessee, TSU had the lowest ACT composite scores for entering freshmen; this position has persisted for at least the period beginning in 1983; the average of the mean scores at TSU was significantly lower (30%) than the other universities; and indeed TSU's score was lower than the average mean for entering freshmen at the community colleges, which (unlike the universities) have no academic admissions standards (Attachment 9).

2. TSU had lower scores for its graduating seniors on the recently required ACT COMP exam (Attachment 10).

3. TSU's percentage of full-time freshmen who subsequently earned a baccalaureate degree within six years after enrollment was on the order of 30% lower than such rates for other state universities in Tennessee for each of the three sets of freshmen studied (Attachment 11).

CONCLUSION: Criterion 5 has not been met by the merged institution.

[9] CRITERION 6: The prescribed racial goal is attained.

The court in its September 25, 1984 *Memorandum and Order* noted the failure of the merger, as of that date, in achieving the racial mix anticipated by the court in its 1977 merger order (p. 5 ff, Att. 12). The court stated,

"It is obvious the phenomenon of a black TSU still exists, and . . . it still negates the contention that the dual system has been dismantled."(p. 6, Att. 12.)

The court further noted that black first-time freshmen as a percent of total first-time freshmen rose from the 1979 (merger in progress) level of 69.7% to 90.2% in 1983. (p. 6, Att. 12.)

While there has been some trend toward desegregation among the faculty, professional and administrative staffs at TSU (Attachment 13), an analysis completed by using TSU Fall 1987 enrollment data by location, race and field of study showed that the original (main) TSU campus is still 75.1% black and the new (former UTN, downtown) TSU campus is 51.3% black. Only on the many other locations (off either campus) can there be seen a majority white student population (76.3%). (Attachment 14.)

CONCLUSION: The merged institution has not achieved the racial goals anticipated by the court.

[10] SUMMARY OBSERVATION

In spite of the provision of the resources of both UTN and TSU, and in spite of special funding from the state, the "new" TSU does not represent a successful merger according to the criteria listed above.

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THE MacNEIL/LEHRER REPORT

"Black Colleges"

In New York

ROBERT MacNEIL	Executive Editor

In Washington, D.C.

CHARLAYNE HUNTER-GAULT	Correspondent
DAVID TATEL	Office for Civil Rights, HEW
ALTHEA SIMMONS	NAACP
LEONARD HAYNES	Institute for Services to Education

In New Orleans

JESSE STONE	President, Southern University

Producer	Reporter
SHIRLEY WERSHBA	JUNE CROSS

Funding for this program has been provided by this station and other Public Television Stations and by grants from Exxon Corporation, Allied Chemical Corporation and the Corporation for Public Broadcasting.

WNET/WETA Air Date: April 10, 1979

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* * *

[7] HAYNES: Well, it's too early to tell really, because what we have are the plans that have been submitted and accepted; implementation is another issue, and we haven't gotten to that right now. What's going on right now in most of the states is that legislatures are reviewing the plans in terms of the monetary aspects and whether or not they'll be able to fund it, because there's an enormous cost attached

to "desegregating" anything. And our concern, though, I would say that that state has impressed me in terms of its movement; they have only one historically black college there which is the University of Arkansas at Pine Bluff, and they have been able to get from the state not only a commitment but actual implementation of some programs and increases in their budget. So that the University of Arkansas at Pine Bluff can in fact be a representative member of the University of Arkansas system.

HUNTER-GAULT: But how about in terms of black colleges generally and desegregation plans? Do you have the same fears and concerns that these plans conceivably could lead to extinction of black institutions of higher learning?

HAYNES: Well, yes – you know, if one looks at the plans, you'll notice that the black colleges unfortunately been assigned, as I say, these roles that are remedial. There is a tendency of states to do what I call the comparability test: they compare the black college to the lowest white state institution when they start dealing with the question of duplication of programs, as opposed to what I think the comparison should be, and that is comparing the black college to the flagship institution, because as you know, black colleges were founded to be the flagship institutions for blacks. And the comparison, in terms of enhancement and strengthening, should be the black college being compared to, let's say, in North Carolina, Winston-Salem State being compared to the University of North Carolina at Chapel Hill or North Carolina State or East Carolina.

HUNTER-GAULT: All right. Mr. Tatel, let me come back to you with Dr. Stone's concerns that these guidelines possibly could lead to the extinction of black colleges. What do you say to that?

TATEL: Well. I think Dr. Stone's concerns are very real. And we, under the direction of the court, have tried to draft these standards in a way that protects black colleges. And major part of them requires the states to strengthen the black colleges by giving them new programs and by giving them adequate funding, by repairing and rebuilding their campuses, and by for the first time really in their histories giving them an opportunity to compete with white institutions.

* * * *

STATEMENT OF DR. DOLORES SPIKES ON ISSUES RELATING TO DESEGREGATION OF HIGHER EDUCATION

By: Dolores R. Spikes
January 30, 1989

1. Statement of educational background and qualifications

Certificate, Institute of Educational Management, Harvard University

Ph.D., Mathematics, Louisiana State University, National Science Foundation Fellow and Ford Foundation Fellow

M.S., Mathematics, University of Illinois at Champaign Urban, University of Illinois Fellow

B.S. Liberal Arts, Major in Mathematics, Southern University-Baton Rouge, LA, Summa Cum Laude

2. Statement of employment history

- President, Southern University System and Interim Chancellor, Southern University at Baton Rouge; Professor October 28, 1988 - present
- Chancellor, Southern University at New Orleans; Professor July 1, 1987 - October 27, 1988
- Executive Vice Chancellor and Vice Chancellor for Academic Affairs, Southern University at Baton Rouge; Professor — August 15, 1985 - June 30, 1987
- Assistant to the Chancellor, Southern University at Baton Rouge; Professor — January 1982 - August 14, 1985
- Assistant to the Chancellor (Part-Time) and Full-Time Professor Mathematics — August 1981 - December 1981
- Full time Teaching, from Assistant Professor through Professor, Southern University at Baton Rouge June 1964 - August 1981 (except for educational leaves)
- Teacher, Calcasieu School System September 1960 - May 1964

- Instructor, Southern University at Baton Rouge September 1958 - May 1959

* * *

[29] 5. c. (cont'd.)

- **Are the state's historically white colleges capable of replicating this result at this time?**

No! Historically white colleges are not capable of addressing the needs of black students because whites are socially and culturally deprived of understanding the needs, desires, abilities and mores of black students.

The historical missions of white colleges have not included the education of minorities and disadvantaged students. Thus predominantly white colleges are ill-equipped to address the special needs and problems of these students.

Most personnel at white colleges do not posses sensitivity and commitment to the education of minorities. Consequently, they do not feel the need to serve as role models and mentors to enhance the learning experiences of minority and disadvantaged students. In addition, minority students have been deliberately excluded from the mainstream of activities of predominately white institutions. This exclusion is evident in minority students' lack of participation in the social/cultural, political, and educational development of the total student. In fact, no effort has been made to ameliorate this increased ethnic friction which significantly interferes with the learning process.

FREEDOM & THE UNIVERSITIES

C. Vann Woodward

Illiberal Education: The Politics of Race and Sex on Campus

by Dinesh D'Souza.
Free Press, 319 pp., $19.95

Defending freedom under attack in universities invariably gets defenders into a variety of trouble. The attackers almost always profess devotion to free speech themselves - except when it is carried to extremes, or is used by fanatics to discredit a cause they believe to be of greater or nobler or more urgent importance, or when it gives offense or pain or distress to people with enough troubles already. Resort to one or another, if not several, of these exceptions will be made in almost any dispute over the limits of free speech. After all, it is only in such instances, at least as perceived by those who resort to these exceptions, that the issue of free speech is likely to rise.

* * *

[35] Universities that were once centers of civil rights activists and advocates of racial integration are now reported not only by D'Souza but by colleagues who have written to me and to such organizations as the American Civil Liberties Union to be places where instances of bigotry are frequent. Anomalies multiply with the number of racial tensions, incidents, and conflicts. The more liberal the tradition and the more deference to protest, the more incidents are reported. Seemingly the more policies to promote harmony the greater the perception and complaint of racial hostility. Offenses are not exclusively from one race, but are perceived as racial only when the victim is from a minority group. However defined, by far the greater number of racial incidents occurs at northern universities, with those in Massachusetts leading them all. It is doubtful that the tide of withdrawal of minority groups into segregated dormitories, dining halls, student unions, clubs, fraternities, sororities, and even to an extent into separate curriculums has promoted racial harmony. Yet university presidents have regularly welcomed, applauded, and financed such resegregations. President Harold Shapiro of Michigan (new president of Princeton) said he could not grant all black professors tenure, but as demanded by Jesse Jackson, he agreed to give

financial support to a new black student union and appropriated $27 million to increase minority faculty and student presence on campus.

* * * *

Testimony of Joe Reed
***Knight v. Alabama*, No. 83-M-1676-S**
(N.D. Ala. dated Feb. 12, 1991)

* * *

[133] Direct - Reed

* * *

Q. Are you familiar with generally the doctrine of separate but equal?

A. Yes

Q. What does that principle mean to you?

A. It meant that as it relates to state action, blacks and whites could be separated or segregated provided the facilities were equal. They could be separate, but the facilities must be equal.

Q. Did ASU at one time operate under that principle?

A. Alabama State University operated under the principle of separate but equal, but it wasn't equal, [134] because that was the law of the land, and that's one of the things I think that we ought to look at in this case and I think that we have a right to demand or to request, whatever term we want to use, as nice as we know how to say it, that the state of Alabama owes Alabama State everything it provided, everything it failed to provide Alabama State under the *Plessy versus Ferguson* doctrine, they owe us that now. There may be some redeeming value in *Plessy versus Ferguson*, we may be the first institution to get out of *Plessy versus Ferguson* today what the state of Alabama didn't give it yesterday, because if the state of Alabama had lived up to what *Plesssy versus Ferguson* commanded, which was the law at that time, separate but equal, Alabama kept its separate, but if it had made it equal, then Alabama State would have a medical school, it would have a law school, it would have all of these professional schools that the University of Alabama now has.

Now, while there are those who might argue that the state of Alabama didn't have this obligation, the law commanded it, that was the law of the land that these, that black schools or black people have the same facilities as whites have. And so we are entitled to under Plessy, for the fifty-four years that Plessy was in operation, the state of Alabama, the things it did not [135] provide us under the command of the law at that time should do so now.

Q. Mr. Reed, you claim that there are still vestiges of segregation and discrimination in higher education, do you not?

A. Yes.

Q. What should be done by the historically white institutions to do away with segregation?

A. They ought to employ some more black faculty, that's the first thing they ought to do. They ought to employ black administrators, more black personnel, so that these blacks who attend these schools can have some role models, they ought to employ some, that's one of the things they ought to do. They ought to take more responsibility in educating the disadvantaged.

Q. What should the state of Alabama do toward doing away with vestiges of desegregation?

A. You know, we have all been in this case for a long time, too long. This case, and I'm not speaking for the board of trustees now, I'm just giving my own opinion as to what ought to happen. Now, I don't think there is any question that the state of Alabama ought to bring Alabama State University and Alabama A & M University up to the standards and the status of the University of Alabama and Auburn. They ought to fulfil [sic] that mission and they ought [136] to carry out the intent of *Plessy versus Ferguson*. They ought to do that.

* * * *

TRIAL TRANSCRIPT
United States v. Alabama
No. 83-P-1676-S
(N.D. Ala. dated July 27, 1985)

* * *

[5330]

* * *

MR. CRENSHAW: Your Honor, as I understand our position, it's only that we do not challenge any use of the ACT as opposed to any particular use of the ACT tape.

MR. POWELL: I don't understand that.

THE COURT: The United States' position is not clear.

MR. CRENSHAW: Your Honor, we do not challenge the use of the ACT as a portion of the admissions formulation as opposed to the particular uses that are being made at the present time.

MR. POWELL: I don't understand that, Your Honor, we challenge it for purposes of examining this witness, but not really, that's what it sounds like.

MR. CRENSHAW: That's not what I said.

MR. CARRIGAN: Your Honor –

MR. POWELL: Well, the first question before – there are two questions, Your Honor, one is whether they have ever raised this position before. That is one question. But one question I have right now is are they raising it now? I'm not even sure from what counsel is saying that they are raising it not [sic]. The question is simply does the United States challenge the validity of the admission standards of the institutions in the state of Alabama in this case.

MR. CRENSHAW: Your Honor, this all arose out of a question where I was trying to ascertain the data that he used in the formulation of his expert opinion. I think we're entitled to inquire into what that data was.

THE COURT: I believe you're entitled to inquire of what the data was since that was the testimony presented, but I don't see any

statement in which the United States challenges the use of the ACT in this case.

MR. DOUGLAS: Your Honor, if I can make the record clear, the government is not challenging the use of the ACT as a part of the admissions process. We concede that point.

THE COURT: All right.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

KNIGHT, et al., and UNITED STATES OF AMERICA,

Plaintiffs and Plaintiff-Intervenors

v.

THE STATE OF ALABAMA, et al.,

Defendants.

CV83-M-1676-S

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW SUBMITTED BY THE UNITED STATES [EXCERPTS ONLY]

* * *

[38] 130. The adoption of the ACT as an admission requirement to the historically white institutions was accomplished during a period when the State, the SBE, the historically white institutions and the state legislature were resisting and actively opposing the admission of black persons to historically white institutions. The circumstances surrounding the adoption of the ACT admissions policy, therefore, leads one to the inescapable conclusion that the desire to exclude blacks from historically white institutions and to thereby preserve the historical racial character of those institutions was a motivating factor in the policy's adoption and implementation in the State of Alabama.

* * * *

TESTIMONY OF EDWARD RUTLEDGE
Knight v. Alabama, No. 83-M-1676-S
(N.D. Ala. dated May 31, 1990)

* * *

[194]Q. And can you identify Exhibit 2?

A. Yes, sir. Exhibit 2 is taken from the data set for fall of 1988. It reflects essentially the same statistics for that respective fall displaying the enrollments, total black enrollments in the state and then enrollments in the two historically black institutions.

Q. And so reading Exhibit 2, if I'm reading it correctly, 40 percent, 40.11 percent of black students attending public four year colleges in Alabama attended A&M or ASU, and 19.11 [195] percent of the black students attending college in Alabama were at A&M or ASU?

A. That's correct.

* * *

[196]Q. Let me ask you how many – looking at State's Exhibit Number 2, how many other public four year colleges are there in Alabama, other than Alabama A&M and Alabama State?

A. How many other public four year colleges?

Q. Yes.

A. There are 16 public colleges in the State of Alabama, public senior institutions, so there would be 14 without A&M and ASU.

Q. Would I be correct then in gathering from this exhibit that in 1988, approximately 40 percent of the black students attended Alabama A&M and Alabama State, those two institutions?

A. Of the public four year institutions, yes, sir. –

Q. And of the other 14 colleges, 60 percent of the black students –

A. That's correct.

Q. So that's spread out among 14 colleges?

A. That's correct.

* * * *

DIRECT TESTIMONY OF MARVIN ROUBIQUE [WITHOUT ATTACHMENTS]

Marvin Roubique is Assistant Commissioner for Finance of the Board of Regents and has served in that capacity since 1986. Prior to that time he worked in the state budget office for a period of 12 years, for the last five of which he served as Assistant State Budget Director. As Assistant Commissioner for Finance, Roubique has the primary staff responsibility to prepare the Board of Regents' budget, to review all budget requests from the institutions, to review the *Formula* annually, and to recommend changes thereon as necessary.

Most funding for higher education in Louisiana is provided under the *Formula*, a mechanism which generates funds based on student credit hours (SCH's), and generates funds for the function of operation and maintenance (including utilities). The number of SCH's is multiplied by the basic values in the *Formula*'s basic factor chart. (See Attachment A). SCH's are categorized according to the level of the student. Further, the SCH's are either low cost or high cost; high cost values are assigned those disciplines such as technology and engineering which generally have higher associated costs such as operation of laboratories. All institutions receive the same dollar value for the same course. For example, a freshman taking English at Southern University-Shreveport generates the same SCH dollars as a freshman taking English at LSU-Baton Rouge. The function of operation and maintenance is funded using a range of values based on utilization of the institutions' buildings. Utilities are provided based on the institution's consumption rate, history and a projected utility rate for the forthcoming year.

The *Formula* method is objective in nature. The collection of measurable data from the institutions permits the use of mathematical calculations. Actual SCH production from the prior academic year is used to generate *Formula* dollars. [2] Actual, not estimated, production drives a large portion of the *Formula*. This removes the need for a subjective evaluation and identifies the needs of all institutions in comparable terms. Equitable distribution of funds, and not necessarily equality, is the basic objective of the *Formula*.

The *Formula* contains a "hold-harmless" provision that no institution need request less than the current year's appropriation for

Formula purposes. This hold-harmless provision results in differing levels of *Formula* implementation among the institutions. If enrollment and subsequent student credit hour production decline, an institution is not penalized by a reduction in *Formula* dollars. The following are examples of the hold-harmless provision at work to the overall benefit of the PBIs: in 1981-82, the statewide average rate of implementation was 97.7%. In that same year Grambling's implementation rate was 118.7%, SUBR's rate was 106.5%, SUNO's rate was 100%, and SUSBO's rate was 95.3%. Among PWIs, LSU was implemented at 96.5%, and USL was implemented at 95.3%.

The *Formula* is a cost-based and goal-oriented document that is designed, at a minimum, to achieve the average appropriation per full-time equivalent ("FTE") student of other SREB states.

The *Formula* does not extend to the internal allocation of funds for any functional category, specific discipline, or program. The internal allocation necessary for development of an effective program at a particular institution of higher education remains the prerogative of that campus' administration and its governing board.

In 1986-87 the *Formula* generated substantially more dollars per FTE student for Southern University-Shreveport/Bossier than any other state institution. (See Attachment B). In the amount of overall state funding received per FTE student, [3] Southern-Baton Rouge, Grambling and Southern-New Orleans ranked fourth, fifth and sixth, respectively, out of 17 institutions of public higher education.

The *Formula* is currently undergoing review and will undoubtedly undergo further review in response to any plan ordered by this Court. It is premature to speculate at this time, however, how the *Formula* might be revised in relation to a plan whose parameters are unclear. The hold-harmless provision mentioned previously is one component that may be subject to change.

[The Board of Regents submits that the following testimony is irrelevant to the issue of remedy and should not be admitted. If, however, any party is permitted to introduce testimony concerning the level of funding received by the predominately black institutions under the Consent Decree, or the alleged underfunding of PBIs during those years, the Regents reserve the right to rebut such testimony. At a minimum the Regents would show as follows:

To supplement funding provided under the *Formula* and by student fees collected from the new students enrolled in the new academic programs, the Board of Regents has each year since 1982 recommended outside-the-*Formula* funding for the support of these programs. Ordinarily, when an institution implements a new academic program, it is required to support that program entirely from *Formula* and self-generated funds. However, the Regents recognized that the PBIs could not quickly and successfully implement the number of new programs prescribed by the Consent Decree without added support. It therefore recommended supplemental funding. In doing so, it attempted to develop programmatic budgets comparable to those of other public higher education institutions in the state. The Regents' recommendations were often lower, and sometimes substantially lower, than the predominately black institutions' requests. The most common disagreements between the Regents and the PBIs related to the number of administrators, faculty, and staff [4] required for a new program, and the salaries of employees. In 1982-83, the legislature appropriated $685,210 in outside-the-*Formula* funds to predominately black institutions for new academic program support; it appropriated $3,457,343 in 1983-84; $6,641,742 in 1984-85; $11,581,220 in 1985-86; $12,793,859 in 1986-87; and $13,011,782 in 1987-88. Also included is an amount of $284,986 to Grambling for help in operation of their physical plant; $2,964,112 for the Off-Campus Center at Southern University-Shreveport/Bossier City; an amount of $3,745,409 has been appropriated to Southern University-Baton Rouge for operation of the Center for Small Farm Research; an amount of $231,444 was appropriated to Southern University-Shreveport/Bossier City for their Management Information System; and $516,449 was funded for administrative positions at Southern University-Shreveport/Bossier City. Although the Consent Decree terminated on December 31, 1987, the Board of Regents recommended continued funding of $15,186,520 for these new academic programs and other program support in 1988-89. Ultimately, $14.8 million was appropriated and the institutions were permitted to determine the allocation of those funds among the Consent Decree programs. Although the Board of Regents had not recommended that any additional funds be appropriated to developmental education, the PBIs allocated a portion of their 1988-89 Consent Decree funds to

those programs. A list of the special appropriations for predominately black institutions from 1982-83 through 1987-88, as well as actual expenditures, appears as Attachment D. The Board's recommended funding and the institutions' allocations of their 1988-89 funding appears as Attachment E.

The outside-the-*Formula* funding recommended by the Regents and appropriated by the legislature for Consent Decree programs was, in comparison to the funding provided in the same years to other Louisiana institutions, extremely generous. Comparisons among a few programs are illustrative:

[5] A. LSU-BR has masters level and baccalaureate programs in Criminal Justice. In 1986-87, LSU reported that its total expenditures for both the master's and baccalaureate programs, in which 216 majors were enrolled, were $291,445. By comparison, Grambling had 49 majors enrolled in its graduate program in fall, 1987. For the graduate program alone Grambling's 1986-87 budget cuts Grambling expended $295,952, more than LSU spent for more than four times the students at two levels of instruction.

B. LSU-BR has a master's program in Social Work. In 1986-87, LSU reported that its total expenditures for the program, in which 248 students were enrolled as majors, were $786,755. In 1987 Grambling had 45 majors enrolled in its M.S.W. program. Its budget request for 1986-87 was $1,439,275. After the budget cut it expended $633,233 for instruction of less than one-fifth the students enrolled at LSU-BR.

C. Southeastern has a School of Nursing, in which approximately 677 majors were enrolled in 1986-87. Its total program expenditures for that year were $903,751. In that year, SU-BR had 63 majors enrolled in its Nursing program, for which it requested $909,723, more than Southeastern's budget for ten times as many students; SU-BR expended $464,795 after the budget cuts. Grambling, which had 457 majors in its Nursing program, requested $728,308 in 1986-87 and expended $579,564 after the cuts.

D. Northwestern was reported to have three baccalaureate programs in Industrial Technology. In fall 1987, 99 majors were enrolled and its expenditures for the three programs totalled $117,953 that year. SUNO has a similar B.S. in Technology, in which 6 majors

were enrolled in fall, 1987. SUNO requested $577,052 for its program that year and expended $299,012 in 1986-87.

[6] As shown on Attachment E, the appropriations for the Consent Decree programs often exceeded the PBIs expenditures; but the institutions frequently did not expend the full amount appropriated by the legislature on the programs they are now contending were underfunded.

Other areas of increased financial support for the PBIs were as follow:

1) Prior to the Consent Decree the Board of Regents had recommended parity funding between the Southern Law School and the Paul M. Hebert Law Center. In 1983, the Board of Regents amended the *State Appropriation Formula* to include a parity mechanism. Additionally, from 1982 through 1987 the state provided additional funds in the amount of $285,000 per year to Southern University for enhancement of its law school.

2) From 1982 through 1987 the legislature additionally appropriated $1,000,000 per year for the enhancement of predominately black institutions; the enhancement funds were distributed as follows: $373,000 annually to Grambling State University and $627,000 annually to the Southern University System.

3) Each fiscal year from 1982-83 through 1987-88 the Board of Regents recommended $70,000 to Grambling State University and $230,000 to the Southern University System for faculty development. The purpose of this program was to provide advanced educational opportunities for faculty members at Louisiana's predominately black institutions. Faculty members who lacked the terminal degree were given the opportunity to take paid leaves of absence in order to obtain their terminal degrees. Total appropriations for this program were $1,793,100.

4) Substantial investments in capital outlay, to be addressed by other witnesses in this proceeding if deemed relevant.

5) Each year, the Board of Regents recommended to the Governor and the legislature that additional monies be appropriated to the predominately black [7] institutions for other-race recruitment as follows: Southern University-Baton Rouge - $143,294; Southern

University-New Orleans - $50,095; Southern University-Shreveport - $26,000; Grambling State University - $99,000. The legislature annually appropriated the necessary funds for other-race recruitment activities of the predominately black institutions from 1982 through 1987.

An Analysis of the Funding of Predominantly White and Predominantly Black Public Institutions of Higher Education in Louisiana 1981-82 and 1987-88

Lucie Lapovsky
July, 1988
[Without Attachments]

Introduction

The issue to be examined is whether Louisiana has provided an appropriate level of funding to its four predominantly black institutions (PBI's) since signing the consent decree with the U.S. Department of Justice. To examine this issue, 1981-82 will be used as the base year for analysis as it is the year prior to the beginning of the consent decree funding.

The Louisiana formula will be used as a standard against which to measure the adequacy of funding for each institution. In 1981-82, the PBI's were funded at 93.8 percent of the formula compared with 80.6 percent at the PWI's. The PBI's were relatively better funded than the PWI's in 1981-82. Comparisons to the base year will be made using the latest available data, 1987-88 whenever possible. An assessment of the adequacy of the funding for the consent decree programs will also be made. The primary data source is the Board of Regents.

Comparative Funding

In order to assess Louisiana's funding of higher education during this period, it is useful to put it in a context relative to higher education funding in the country. In 1985-86, Louisiana ranked 28th in appropriations per capita in State tax funds for operating expenses for higher education (see Table 1). This was one percent below the national average. Louisiana fell to 38th in 1987-88, fifteen percent below the national average. Between 1985-86 and 1987-88, State appropriations for higher education in [2] Louisiana declined by five percent compared with an increase of 11 percent in the United States as a whole (see Table 2). In 1985-86, Louisiana ranked 32nd in revenues per student from State and local appropriations at public

institutions. This was nine percent below the national average (see Table 3). Since 1985-86, funding in Louisiana has declined relative to the national average so that its relative rank is even lower today. Between 1981-82 and 1987-88, average salaries of full-time faculty in public institutions in Louisiana have increased 13.6 percent compared with the national average of 41.7 percent (see Table 4). Among the fifteen SREB states, faculty salaries ranked third in the region in 1981-82 and 14th in 1987-88.

In this context of declining support over this period of time and a relatively low absolute level of support for higher education in Louisiana, I will examine the funding of the predominantly black institutions and compare it with the funding of the predominantly white institutions. I will examine State funding in a variety of ways as well as review several indicators that reflect the adequacy of funding for the various institutions. I will first make aggregate comparisons among all institutions, and then I will make comparisons among and between comparable institutions.

Enrollment

In 1981-82 Louisiana had 115,889 full-time equivalent students (FTES). Enrollment increased 1.7 percent to 117,842 in 1987-88 (see Table 5). In 1981-82, 12.9 percent of the total [3] enrollment was in the PBI's; by 1987-88, 14.4 percent of all Louisiana's enrollment was in the PBI's. Enrollment during this period grew by more than 30 percent at two of the PBI's, Grambling and Southern-New Orleans. Enrollment declined 4.5 percent and 4.1 percent respectively at the other two PBI's, Southern-Baton Rouge and Southern-Shreveport.

Clearly the PBI's were becoming more attractive during this period as evidenced by the fact that they were attracting a relatively larger share of the enrollment at Louisiana public institutions. All of the growth in enrollment between 1981-82 and 1987-88 is attributable to the PBI's.

State Appropriations

Louisiana appropriated $418.1 million for higher education in 1981-82 and $466.3 million in 1987-88, an increase of 11.5 percent

(see Table 6). In 1981-82, the PBI's received $45.5 million or 10.9 percent of the total state appropriation. In 1987-88, the PBI's received $59.8 million or 12.8 percent of the total appropriation. During this period, State appropriations at the PBI's increased 31.3 percent compared with 9.1 percent at the PWI's. There is very little difference in our conclusions if we analyze the change in State appropriations to PBI's and PWI's including or excluding the category labelled "Other" on Table 6. "Other" includes the System Boards, the Ag. Center, and the Medical Center. During this period there has been a significant increase in the Medical Center funding, 20.4 percent. The Ag. Center's funding has increased only 4.1 percent. Funding for both [4] the LSU-Board and Trustees-Board has declined by more than 20 percent each while funding for the Southern Board has increased by 48.9 percent.

State appropriations per FTES averaged $2701 in 1981-82 compared with $2953 in 1987-88, an increase of 9.3 percent (see Table 7). State appropriations per FTES averaged $2967 at the PBI's in 1981-82 and $3436 in 1987-88, an increase of 15.8 percent. State appropriations per FTES averaged $2662 at the PWI's in 1981-82 and $2872 in 1987-88, an increase of 7.9 percent. State appropriations per FTES at the PBI's were 11.5 greater than the State appropriations per FTES at the PWI's in 1981-82 and increased to 19.6 percent greater by 1987-88.

The State in its funding decisions between 1981-82 and 1987-88 clearly favored the PBI's as compared with the PWI's. The PBI's increased their relative share of the State's higher education spending. In addition State funding per FTES increased more than twice as much at the PBI's as compared with the PWI's during this period.

The Formula

Description

Louisiana uses a formula to establish the base level of funding for all of its institutions of higher education. The formula is similar to that used in many states throughout the country (BOR, State Appropriation Formula, 1988). It has a set of dollar values per credit hour with the rates varying by student level and by type of academic

program. The formula also has [5] factors for utilities and operation and maintenance of the physical plant. The formula includes a hold harmless provision which provides that an institution will not receive less than its formula allocation from the prior year. The majority of funds in the formula is derived from the instruction component; therefore, my analysis will be limited to that.

Table 8 provides the basic factor chart for 1981-82 and 1987-88. The values per credit hour in 1981-82 ranged from $51.12 for lower cost, lower level undergraduates to $700.40 for higher cost, doctorate credit hours. In 1987-88 the credit hour values ranged from $58.33 for lower cost, lower level undergraduate credit hours to $1751.27 for lower cost, doctorate credit hours. Between 1981-82 and 1987-88, the value of all credit hours increased except lower cost Masters which declined 11.0 percent (see Table 9). The greatest increases occurred in the value of Pharmacy Masters credit hours and doctorates. In 1981-82, higher cost doctorate credit hours had a value 13.7 times greater than lower cost, lower level undergraduate credit hours (see Table 10). In 1987-88, higher cost doctorate credit hours were valued at 30 times lower cost, lower level undergraduate credit hours. When one examines the formulas in other states which use a matrix similar to Louisiana's, the range between types of credit hours varies considerably but is often as great as Louisiana's range. In Maryland, the range is 1 to 40. The formula should be used as a standard against which to measure the relative adequacy of funding at each public institution in Louisiana.

[6] Application of the Formula

In 1981-82, Louisiana institutions subject to the formula received $298.1 million in funding through the formula, 95.2 percent of their total funding from the State (see Table 11). The PBI's received 91.5 percent of their total funding from the formula while the PWI's received 95.9 percent of their funding via the formula. The formula was funded at 82.2 percent of its value with the PBI's funded at a significantly higher percent of the formula than the PWI's, 93.8 percent compared with 80.6 percent at the PWI's.

In 1987-88, Louisiana institutions subject to the formula received $296.7 million in funding through the formula, 85.2 percent

of their total funding. In 1987-88, 15 percent of higher education funding came for [sic] special purposes compared with less than five percent in 1981-82. The PBI's received 69.5 percent of their total funding from the formula while the PWI's received 88.4 percent of their total funding from the formula. The significant difference in dependence on the formula for funding is the consent decree funds at the PBI's.

In 1987-88, the formula is funded at 66.5 percent with the PBI's funded at 73.4 percent while the PWI's are funded at 65.5 percent. Both PBI's and PWI's received slightly fewer formula dollars from the formula in 1987-88 than in 1981-82. Had the formula been funded at 100 percent of its value, the PBI's would have received 26.9 percent more in formula dollars in 1987-88 compared with 1981-82 while the PWI's would have received an increase of 22.5 percent.

[7] In 1981-82, full funding of the formula would have provided $3130 per FTES with an average of $2896 at the PBI's and $3165 at the PWI's (see Table 12). The difference in funding between the PBI's and PWI's at full funding is attributable to the difference in the distribution of credit hours. In 1981-82, no doctoral credit hours were offered at PBI's and only 6.5 percent of the credit hours at the PBI's were at the graduate level while 66.6 percent of all the credit hours at the PBI's are lower level undergraduate (see Table 13). By comparison, 9.4 percent of the credit hours at the PWI's are at the graduate level with 0.6 percent doctoral. Only 55.3 percent of the credit hours are at the lower level undergraduate.

By comparison, in 1987-88 only 61 percent of the credit hours at the PBI's were lower level undergraduate, a reduction of 8.5 percent in the distribution of credit hours (see Tables 14 and 15). The distribution of credit hours at the PBI's increased by 21.1 percent at the upper level undergraduate level compared to an increase of 8.4 percent at this level for the PWI's. In absolute terms, the percent of credit hours at all levels at the PBI's increased while at the PWI's they increased only at the upper level undergraduate and doctorate leveis (see Table 16). While credit hours at the doctorate level at the PWI's doubled between 1981-82 and 1987-88, they accounted for only 1.3 percent of the total credit hours at the PWI's in 1987-88.

Given the deterioration in the fiscal situation in Louisiana during this period, relative levels of funding for higher education fell. The PBI's continued to be funded at a higher [8] percent of the formula than the PWI's. Using the formula as the standard, the PBI's were relatively better funded than the PWI's in both 1981-82 and 1987-88.

Faculty Salaries and Student Faculty Ratios

In 1987-88, Louisiana had 5,248 full-time faculty who received an average salary of $29,925 (see Table 17). The average student/faculty ratio was 22.5:1 full-time equivalent students to each full-time faculty. The average faculty salary at the PBI's was $27,354 with a 17.3 to 1 student faculty ratio. At the PWI's, the average salary was $30,512 with an average student faculty ratio of 23.6 to 1.

Given the level of resources the PBI's devoted to full-time faculty (more than $26 million), they could pay the same average salary as the PWI's and still have a student faculty ratio below that of the PWI's, 19.3 to 1. Alternatively, the PBI's could pay an average salary of $37,235, 22 percent above the average at the PWI's and have the same student faculty ratio as the PWI's.

Decisions concerning number of faculty and faculty salaries are institutional decisions. The PBI's have chosen a more labor-intensive use of their resources than the PWI's. The State has provided more resources to the PBI's than the PWI's for faculty. Therefore, the PBI's could operate with a higher average salary than the PWI's and a lower student/faculty ratio.

[9] Comparative Institutions

Comparisons of financial data of institutions can only legitimately be made among institutions with similar roles and missions. Because of economies of scale, comparisons should also only be made among institutions with similar numbers of students. In order for funding to be equitable among comparable institutions, similar amounts should be appropriated for comparable institutions. A complete discussion of the legitimacy of institutional comparisons can be found in Frank Schmidtlein's paper "A Critique of the Report Prepared by Dr. Larry L. Leslie, Dated March 23, 1981", May 22, 1981.

In Dr. Leslie's report "An Analysis of Financial Equity Between Predominantly Black and Predominantly White Louisiana Institutions of Higher Education and of Consent Decree Funding, 1979-1988" dated June, 1988, he states that

> Comparisons are made of Southern University and Louisiana State University, and then of Grambling versus Louisiana Tech and other Board of Trustees Institutions. These two comparisons are separate because Southern and LSU are held to be comparable institutions, in that campuses of each institution were established in several cities as black-white counterparts. Grambling and Tech are compared largely because Tech is the institution nearest to Grambling. (p.3)

Nowhere in the literature have I found geographical location of an institution or historical development of an institution as important characteristics to use as an appropriate basis for [10] financial comparisons. Leslie goes on to raise the issue of mission equivalence. Nowhere in the consent decree is there any indication that the court wants to replicate LSU-BR at SO-BR. In the award of new academic programs to the PBI's in the consent decree, there are only four new doctoral programs, one at Grambling and three at SO-BR, proposed for development. It has never been the intent to develop another comprehensive research university in Louisiana.

We now must ask can we make any valid cost comparisons between any of the PBI's and PWI's in Louisiana. Characteristics which I will examine to identify comparable institutions are enrollments, distribution of credit hours by level, and number of academic program majors. Information also is provided on other institutional characteristics (see Tables 18-21). These are basic characteristics which can be reviewed to ascertain if an institution will have similar resource requirements.

Enrollments tend to allow institutions to operate more efficiently up to a certain point. Certain economies of scale result to larger institutions which make cost comparisons of institutions of significantly different sizes illegitimate. The distribution of credit hours by level also has financial implications. As seen from all of the states which use formulas, it is assumed that undergraduates require fewer

resources to educate than graduate students. Further, lower level undergraduates can be educated for less money than upper level undergraduates. A third measure which is reviewed is number of [11] academic program majors. This is an indicator of institutional complexity. In making resource comparisons, you also would want to compare institutions with a similar array of academic programs. It is known than certain types of academic programs, laboratory-intensive programs, require more resources than lecture-intensive programs. Therefore, an institution with a high percent of its students taking science courses will be more expensive to operate than an institution which concentrates on business courses. Equity would require the institution which is science-intense to have a higher level funding than the institution which is business-course intense.

First, I will search for a peer or peers from among the PWI's for Grambling. The first characteristics to examine is enrollment because comparable institutions must be of a similar size for financial comparisons.

	Differences from Grambling		
	FTES	Number	%
Grambling	5,440		
Northwestern	4,594	(846)	(15.6%)
McNeese	6,347	907	16.7
Nicholls	6,247	834	15.3
Delgado	4,515	(925)	(17.0)

The above institutions are the only PWI's in Louisiana within 20 percent of Grambling's enrollment. The credit hours at these institutions are distributed in different fashions which will make some of the institutions noncomparable with Grambling.

[12] Percent Distribution of Credit Hours

	Undergraduate	Graduate
Grambling	95.4%	4.5%
Northwestern	91.2	8.8
McNeese	92.1	8.0
Nicholls	94.6	5.5
Delgado	100.0	0.0

Delgado falls out at this point since all of its credit hours are lower level undergraduate. The institution most similar to Grambling in terms of distribution of its credit hours is Nicholls. Grambling has 95.4 percent of its credit hours at the undergraduate level and Nicholls has 94.6 percent (see Appendix A). Grambling has 4.5 percent of its credit hours at the graduate level and Nicholls has 5.5 percent. Northwestern and McNeese have 8.8 percent and 8.0 percent respectively of their credit hours at the graduate level. A review of the program inventory indicates that Grambling offers programs in 38 major fields of study while Nicholls offers 34 majors. Although Nicholls is the most similar Louisiana institution to Grambling and direct comparisons will be made between the two, Nicholls and Grambling certainly have differences between them.

To ascertain if there is a peer or peers for Southern-Baton Rouge, I will select those institutions with similar enrollments.

		Difference from SO-BR	
	FTES	Number	Percent
SO-BR	8,174		
LA. Tech	9,125	951	11.6%
Northeast	9,303	1,129	13.8
Southeastern	6,885	(1,289)	(15.8)

[13] Louisiana Tech with 9,125 FTES, Northeast with 9,303 FTES, and Southeastern with 6,885 FTES are the only Louisiana institutions which are within 20 percent of SO-BR's enrollment. The credit hours at these institutions are distributed in different fashions.

Percent Distribution of Credit Hours

	Undergraduate	Graduate
SO-BR	90.9%	9.1%
La. Tech	92.9	7.1
Northeast	93.2	6.8
Southeastern	95.7	4.3

The distribution of credit hours at SO-BR is most similar to La. Tech and Northeast. SO-BR offers 111 academic programs and 43 different major fields while La. Tech has 134 academic programs with 50 major fields and Northeast has 113 academic programs with 49 fields. SO-BR has one doctoral program while La. Tech has five, Northeast has one and Southeastern has none. SO-BR has one specialist degree program, La. Tech has two, Northeast four and Southeastern two. Given these similarities, direct comparisons will be made among SO-BR, La. Tech and Northeast. Southeastern is eliminated since it has no doctoral programs and has significantly fewer graduate students than SO-BR.

The only institution of a similar size to Southern-New Orleans is LSU-Shreveport. SO-NO has 2700 FTES and LSU-S has 2,868 FTES. SO-NO has 96.5 percent of its credit hours at the undergraduate level while LSU-S has 93.8 percent of its credit hours at the undergraduate level. Neither institution has [14] any doctoral programs. SO-NO has 51 programs while LSU-S has 47. SO-NO has only one graduate program while LSU-S has six graduate programs. SO-NO offers programs in 25 major fields and LSU-S in 22. It is clear there are similarities between these two institutions and therefore direct comparisons will be made.

There is no institution in Louisiana with an enrollment close to Southern-Shreveport with its 609 FTES. Therefore no direct comparisons will be made between SO-S and other Louisiana institutions.

Direct comparisons will be made among these similar institutions. These comparisons are legitimate as the roles and missions of these institutions are comparable.

Grambling and Nicholls

Grambling is a campus which has grown from 3707 FTES in 1981 to 5440 FTES in 1987, an increase of 46.7 percent. During this same period State appropriations increased 44.1 percent just about equal to the rate of growth in students (see Table 22). The growth in resources commensurate with the growth in enrollment means that in real terms Grambling has much greater resources per student than it did in 1981. This is attributable to the fact that until the point where you encounter diseconomies of scale, the additional or marginal cost of another student is less than the cost of the last student. Diseconomies of scale occur when an institution grows so large, probably in excess of 25,000 or 30,000 students, although there is no agreement on the correct number, that the addition of another student will require changes in the [15] institution's operations such that the cost of that additional student is greater than the cost of the previous student. Grambling is certainly nowhere near such an enrollment level. Grambling enjoyed a period during which it could increase the efficiency of its operation.

Grambling and Nicholls have grown to be similar during this period. In 1981 Nicholls had 6027 students, almost twice Grambling's enrollment. Nicholls' enrollment has increased only 4.1 percent during these six years to 6274.

The formula, when fully funded, would provide Grambling with $2744 per student and Nicholls with $3026. The reasons that the formula legitimately would provide a higher level of resources to Nicholls is that it has a higher percent of its undergraduate credit hours at the upper division than Grambling, 38 percent versus 33 percent, and a lower percent of low cost credit hours, 66 percent versus 72 percent.

Because Grambling grew rapidly at a time of severe resource shortages in Louisiana, its formula funding fell from above 100 percent to 69 percent of the formula. Nicholls also experienced a decline in the percent of the formula which was implemented from 79.6 percent to 75.6 percent.

In 1987-88, Grambling received $3051 per student from the State while Nicholls, a very similar institution, received $2408 per

student, 21 percent less per student than Grambling. At full implementation of the formula, Nicholls should receive 10 percent more than Grambling.

Average faculty salaries are within two percent of each [16] other. Grambling is using its resources to operate at a significantly lower student-faculty ratio than Nicholls; 20.5:1 versus 25.5:1. The two institutions have similar size libraries which gives Grambling almost ten percent more books per student than Nicholls.

Grambling's level of total State funding gives it resources to operate at a level which is 11 percent in excess of full funding of the formula. Nicholls is operating at a level which is more than 20 percent below the formula.

Clearly the State has favored Grambling relative to Nicholls in its funding decisions. Grambling received $643 more per FTES in 1987-88 from the State than Nicholls. The formula, the standard for equitable allocation of resources among institutions, would provide $282 more per FTES at Nicholls as compared with Grambling.

Southern-Baton Rouge, Louisiana Tech and Northeast

These are three institutions which have experienced only modest changes in enrollment in the last six years. Enrollments at SO-BR and La. Tech have fallen 4.5 percent and 7.4 percent respectively, while Northeast's enrollment increased 2.5 percent (see Table 23). In terms of distribution of credit hours, SO-BR has changed to be much more like its comparable institutions with a significant change in the distribution of undergraduate credit hours between lower division and upper division. In 1981, more than 67 percent of SO-BR's credit hours were lower division whereas in 1987 only 53 percent were.

[17] The similarity among the institutions can be seen in the level of resources full funding of the formula generates; $3,622 per student for SO-BR, $3631 for La. Tech and $3439 for Northeast. The formula is implemented at 73.6 percent for SO-BR and less than 70 percent for the other two campuses. SO-BR received $2667 per student from the formula in 1987 while La. Tech received $2471 and Northeast $2386. The disparity in funding these campuses grows when you look at total

State dollars per student. SO-BR received $3535 per student, 33 percent more than La. Tech and 41 percent more than Northeast.

Southern-Baton Rouge has used these resources to fund a large library and a very low student-faculty ratio among other things. SO-BR has almost twice the library books of the other two campuses. SO-BR is operating with a student/faculty ratio of 15.7:1 while La. Tech has 21.3:1 and Northeast has 23.6:1. The faculty salaries for the all ranks average are $28,197 at SO-BR compared with $30,209 at La. Tech. If SO-BR chose to pay the same salaries as La. Tech, it would have to increase its student/faculty ratio to 16.8:1, still substantially below its comparison institutions.

SO-BR is receiving State funds which provide it with resources to operate which are within 2.5 percent of full funding of the formula. On the other hand, the resources provided to La. Tech and Northeast are 27 percent below the amount required by the formula.

The State has provided SO-BR with considerably more funding than Louisiana Tech and Northeast. SO-BR has $876 more in State [18] funds per student than La. Tech and $1023 more per student than Northeast. This is a *very* significant funding difference.

Southern-New Orleans and LSU-Shreveport

SO-NO and LSU-S are similar in enrollment size and both are predominantly undergraduate institutions. SO-NO has increased its enrollment 30.5 percent since 1981 while LSU-S has grown only 7.1 percent (see Table 24). State appropriations have grown 28 percent at SO-NO from $6.4 million in 1981-82 to $8.1 million in 1987-88. By comparison, State appropriations at LSU-S have increased only 5.5 percent and are 11 percent less than the appropriation at SO-NO.

Full funding of the formula generates $2869 per FTES at SO-NO and $3291 at LSU-S. The difference is understood in large part by the difference in the distribution of undergraduate credit hours. At SO-NO, 75 percent of the undergraduate credit hours are lowest level whereas at LSU-S only 51 percent are lower level. The formula provides between 40 and 70 percent more for upper level undergraduate credit hours than lower level undergraduate credit hours.

The formula was implemented at 73.4 percent and 75.2 percent at SO-NO and LSU-S respectively in 1987-88.

In 1987-88, SO-NO received $3013 per FTES in State appropriations, 19.5 percent more than LSU-S which received $2522. The total State appropriations provided SO-NO with funds five percent greater than full funding of the formula while LSU-S received State appropriations more than 20 percent less than full funding of the formula. SO-NO received significantly more dollars [18] per student from the State than LSU-S.

Southern-Shreveport

SO-S had an enrollment of 635 FTES in 1981-82 and 609 FTES in 1987-88. All credit hours are lower level undergraduate. SO-S received $7410 in State appropriations per FTES in 1987-88, more than 2.5 times the average level of appropriations and almost twice the amount received by LSU-BR, the major research university. According to the most recent data published by the National Center for Education Statistics, the average level of State *and* local appropriations at public two year institutions was $3050 in 1985-86 (SHEP, 1988, Table P).

Consent Decree Guidelines

The Louisiana Board of Regents has promulgated a set of guidelines for consent decree budget requests. The PBI's may request consent decree funds for any of the new programs/activities included in the consent decree. The BOR has developed guidelines for consent decree budget requests. The guidelines provide a teaching load for graduate faculty of nine hours and twelve hours for undergraduate faculty. This is the standard used throughout the country. The guidelines recommend an average section size of 20 per class graduate and 27 per class undergraduate. This is somewhat on the high side especially for laboratory-intensive subjects.

The consent decree guidelines provide parameters to request operating funds, equipment, capital outlay items and [20] assistantships. Most of these items are to be zero-based and justified on need. Certain percents of salaries or program budget are recom-

mended for supplies and operating services in 1987-88 guidelines. The recommended percents are similar to the expenditures for these items at institutions throughout the country.

The guidelines allow for deviations from these recommended parameters with justification. It is clear that the BOR has allowed deviation from the guidelines as many of the consent decree program budgets reflect student/faculty ratios far below the guideline. For example at Grambling the Public Administration program received 3.5 faculty for 20 students in 1986-87 and the BOR is recommending 4.5 faculty for a projected 35 students for 1987-88. This number of faculty will provide the program with a 7.8:1 student/faculty ratio in 1987-88. A review of consent decree budgets indicates that student/faculty ratios significantly below the guideline level are the rule rather than the exception.

Further evidence that most consent decree programs are operating significantly in excess of the guidelines can be seen from the level of funding these programs are receiving. Overall, the consent decree programs received an average $4527 per full-time equivalent student from consent decree funds in 1987-88 (see Table 25). In addition, students in consent decree programs are counted in the formula. The PBI's received an average of $2387 per FTES from the formula. Therefore, students in consent decree programs were funded at an average rate of $6914. This is more than double the average level of State funds per FTES at all Louisiana [21] institutions in 1987-88.

At Grambling, SO-BR and SO-NO there are 26 consent decree programs in this analysis. Twenty-three of these programs have received funding for five years and eighteen for six years. Five years is generally more than sufficient to fully phase-in bachelors and doctorate programs since it provides time to graduate a class. Less time is required to phase-in associate and masters degree programs. After phase-in of an academic program, full funding of the Louisiana formula amount combined with the tuition collected from the students in the program should provide sufficient resources for operation of the program. Louisiana continues to provide consent decree funds for programs which have been in operation for more than five years.

In Clifton Conrad's paper "A Study of Academic Programs in Louisiana's Public Colleges and Universities: A Report for the U.S.

Department of Justice," June 29, 1988, he identifies ten out of the 26 consent decree programs at Grambling, SO-BR and SO-NO as "most developed." It should be noted that the average level of funding per student in these "most developed" programs is $4431, 5.6 percent less than the average level of funding for all the consent decree programs at these institutions. Therefore, the "less developed" and "least developed" academic programs received a higher average level of funding at Grambling, SO-BR and SO-NO than the "most developed" programs.

The PBI's receive formula funds plus consent decree funds plus tuition for all students enrolled in consent decree programs. This allows the consent decree programs to operate at the level of [22] resources significantly in excess of full-funding of the formula. Full funding of the Louisiana formula would provide the PBI's with $3251 in 1987-88; the consent decree programs are funded 39.2 percent in excess of the formula amount if one just looks at the consent decree funds. Attributing consent decree funds and formula funds to the consent decree programs provides funding for the consent decree programs which is more than twice the amount required when the formula is fully funded.

Louisiana has been extremely generous in its funding of consent decree programs. It is not only providing a generous level of funding in 1987-88, but Louisiana has provided this funding for five years or more for more than half of all the consent decree programs and more than 85 percent of the programs at the four-year institutions.

Conclusions

The PBI's have been funded at a higher percent of the formula than the PWI's in both 1981-82 and 1987-88. The PBI's have received a larger percent of funds from outside of the formula in both 1981-82 and 1987-88 than the PWI's.

In reviewing the direct comparisons among/between institutions, the PBI always received more State dollars per student than the comparable PWI. In 1987-88 Grambling received 26.7 percent more than Nicholls. SO-BR received 32.9 percent more than La. Tech and

40.7 percent more than Northeast. SO-NO received 23.8 percent more than LSU-S.

Overall, the PBI's received $3436 per full-time equivalent [23] student compared with $2872 per FTES at the PWI's from State appropriations in 1987-88. Consent decree funding averaged $4527 per FTES in 1987-88, substantially more than full-funding of the formula. The total level of State funding received by the PBI's in 1987-88 was equivalent to funding at 105.7 percent of the formula. Therefore, if Louisiana is able to fully fund its formula in the future, the PBI's, with fully phased-in consent decree programs, should have adequate resources. The formula provides an equitable means to distribute funds among institutions and at full funding provides a reasonable level of State funds.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT, JR. et al.,

Plaintiff, intervenors,

UNITED STATES OF AMERICA,

Plaintiff;

vs.

THE STATE OF ALABAMA, GUY HUNT;
THE ALABAMA STATE BOARD OF EDUCATION, WAYNE TEAGUE, et al.,

Defendants.

CIVIL #83 M 1676 S

Testimony of **Dr. James H. Wharton** reported April 2, 1991, before the Hon. Harold L. Murphy in Birmingham, Alabama.

REPORTED BY:
Martha J. Frutchey
U.S. District Reporter
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Dr. James H. Wharton 4/2/91

VOLUME 1 OF 2

* * *

[98] Direct - Wharton

* * *

Q. This morning you indicated to the Court that you [99]had played a role in the development and implementation of the Louisiana Title VI consent decree that went into effect in 1981. You recall that testimony?

A. Yes, I do.

Q. Can you give us a brief summary of the provisions of that consent decree as they related to the development of academic programs and capital construction?

MR. BLACKSHER: Your Honor, I don't object except to, of course, refer the Court to the actual document to the extent this characterization is inconsistent with the document, itself, which I believe is reported.

MR. LEVIN: This is only to set up a question so that the witness can offer an opinion as to the effectiveness of the remedies employed.

THE COURT: All right. Well, I'll let him proceed, bearing in mind Mr. Blacksher's comments, so I'll permit it for the purpose of allowing him to then give some conclusion, if that's what you're seeking.

MR. LEVIN: Yes, sir.

A. Please recap for me exactly what you want.

Q. I'm interested in your providing a brief summary to the Court of the provisions of that consent decree as they related to the expenditure of funds for academic program development and for capital construction.

A. The consent decree consisted of about seven [100] different components. The major component of the consent decree consisted of the fact that the predominantly black institutions would receive funding above and beyond the Louisiana formula to initiate new academic programs in order to enhance the other race enrollments at those four institutions.

The institutions involved were Southern University-Baton Rouge, Grambling State University, Southern University in Shreveport and Southern University in New Orleans.

Initially there was some 62 academic programs that were to be implemented.

Q. Now, was there an amount — strike that.

Of the 62 programs that were to be implemented, how many were eventually implemented?

A. Okay, one program was withdrawn based on the decision that it wasn't going to work out. Another program, the doctorate of professional accountancy at Southern University, a request was made on that program to change it to a doctorate, a Ph. D. in accounting and that change was concurred upon, but Southern never submitted the plans to implement that particular program. So, in essence, essentially all of the programs were ultimately implemented except for two programs.

The expenditures on the programs over the life of [101] the consent decree consisted of some total expenditure of 76 million, 75 million dollars. That was the operating budgets of the programs. In addition to that, there was a capital construction program, the board of regents brought in consultants.

Q. You said the board of regents brought in consultants. When did they do that?

A. In 1981. And a review was made of those campuses, and based on the recommendation of the consultants, there was a need to expend about 55 million dollars to enhance the four campuses.

The regents incorporated that into their capital construction plans over the life of the consent decree, 52 million dollars was appropriated and expended toward facilities.

Q. All right. Now looking at those, have you had an opportunity to look at the results in those academic programs that were identified as consent decree programs to be established at the predominately black institutions? When I say to look at them, I mean in terms of their eventual effectiveness in attracting other race students?

A. Yes, there was some of the programs that were in areas that LSU had programs. An example would be social work at Grambling State, criminal justice at Grambling [102] State.

Q. Were both of those consent decree programs?

A. Both of those were consent decree programs. The annual expenditures in social work at Grambling were approximately seven hundred thousand dollars a year. They had 48 students enrolled.

Q. How did that compare with the number of students and the expenditures at Louisiana State University for social work?

A. The amount of expenditures were fairly close, they were generally within fifty thousand or a hundred thousand dollars of one another, but LSU was carrying 250 students in the social work program as opposed to the 48. So the expenditures per student were four or five times as high.

In the area of criminal justice, it's almost an exact parallel, the expenditures were in the range of three hundred thousand dollars a year for most of the consent decree, although at the end of the consent decree the expenditures were up at Grambling above $400,000 a year. There were again, I think it was 49 students enrolled in that program at Grambling, and again, approximately 250 enrolled at Louisiana State University, and the cost per student were roughly four to five times as high at Grambling.

[103] Another degree program I watched with some interest was one at Southern University, environmental chemistry. Over the life of the degree [sic] some $1,350,000 was expended on that particular program and it had five students enrolled at the end of that program.

Q. Five students in total?

A. Five students in total.

Q. Do you know what the white presence at the predominantly black institutions was prior to the implementation of the consent, the 1981 consent decree?

A. Yes.

Q. What's that figure?

A. There are about 100,000 white students, that's a ballpark figure, but it helps you to understand the percentages to know how large the base is. Prior to the beginning of the consent decree programs, about three tenths percent of the white enrollment in Louisiana was at the predominantly black institutions.

Q. And what was the figure after the academic, the new academic programs had been fully implemented?

A. At the end of the consent decree, the figure had risen to 1.1 percent of the white students that were enrolled at the predominantly black institutions.

Q. What was the overall percentage of white students in the predominantly black institutions after the consent [104] decree?

A. Okay. When you say after the consent decree, at the very end of the consent decree, the enrollments of the predominantly black institutions were about 5.8 percent white. That's taking all four of those institutions collectively.

Q. That include undergraduate and graduate?

A. That includes undergraduate and graduate, right.

Q. Do you have any other observations with respect to the effectiveness of the establishment of the academic programs?

A. Yes, one comment would be the enrollment of black students in the state, prior to the consent decree, 57 percent of the black students were enrolled in predominately white institutions. At the end of the consent decree, that had fallen to 48 percent of the black students were enrolled in predominately white institutions.

If one looks at the overall statistics of the consent decree programs, looking at fall of 1988 figures, there were 211 white students involved in the consent decree programs; total enrollment in those programs of about 1650 total students enrolled. The annual expenditures were 14.8 million dollars for the programs, and if one then looks at it from the point of view of [105] that this money was expended in order to increase the other race presence, you can look at it one of two ways, it's $70,000 per year per white student or if you look at the cumulative amount of money, it was $350,000 a year per white student that was enrolled in the consent decree.

Q. Do you have any other comments on the Louisiana consent decree?

A. No, I don't.

MR. LEVIN: May I have a moment, Your Honor?

THE COURT: Yes, sir. Is that a five year period, Doctor?

A. Your Honor, the program was approved in the early fall of 1981. It really didn't get started enrolling until 1982, and the investments in 1982 were reasonably small. The consent decree ended December 31, 1988 and so that's the time frame.

Q. Just a point of clarification, Doctor Wharton, with respect to the $350,000 per white student that you testified to, that's $350,000 per what, per year?

A. No, I said cumulative, and what you do is you take the 75 million dollars, invest it over that time period, and then you take the 211 white students and you divide 75 million by 211 and that gives you $355,000 per white student. In other words, if that was the objective, this [106] is how much has been spent to get to the point where you have added 211 white students to the consent decree.

MR. LEVIN: Thank you. That's all, Your Honor.

* * * *

DIRECT TESTIMONY OF KERRY DAVIDSON
[Without Attachments]

Kerry Davidson has headed the Board of Regents' Academic Affairs Division since its creation in 1975. He is presently the Deputy Commissioner for Academic Affairs and Research. Prior to that time he served as Chairman of the History Department, Chairman of the Department of Social Sciences at Southern University-New Orleans, and Chairman of the History Department at Fisk University.

As the Regents' Associate Commissioner for Academic Affairs and Research, Davidson has the primary staff responsibility for reviewing proposed academic programs and evaluating existing programs at Louisiana's public institutions of higher learning. [Davidson was previously stipulated to be an expert in the development of academic programs (1981 deposition, p. 47)].

In determining whether to approve a new academic program at an institution, Davidson and the Regents consider the following: 1) existing and required resources; 2) present and available faculty; 3) projections for possible students, quality as well as quantity; 4) interest by outside agencies; 5) library resources; 6) institutional commitment to the program on a long-term basis; and 7) (in the case of a proposal made by a PWI, the Consent Decree required consideration of: possible impact on the enhancement of PBIs.)

The evaluation of quality of an existing program depends in large measure on the nature of the program. At the doctoral level and for many specialized programs at the master's level, outside consultants are normally brought in.

Under the Consent Decree a total of 62 new academic programs were approved by the Board of Regents for implementation at the predominately black institutions. By June 7, 1988, 19 new programs had been put into place at Southern University-Baton Rouge, 14 new programs at Southern University-New Orleans. 18 new [2] programs at Grambling State University, and 11 at Southern University-Shreveport. In addition, five cooperative programs had been approved for implementation by Southern University-Shreveport and Bossier Parish Community College. Two programs prescribed by the Consent Decree have not been implemented by the Board of Regents.

Grambling State University withdrew its request for the M.S. in Science Education and Southern University-Baton Rouge requested a Ph.D. in Accounting instead of the prescribed Doctor of Professional Accountancy. The latter request was approved by the Justice Department in 1987. The program proposal has not yet been submitted by SU-BR for approval by the Regents, and Southern has indicated that it may not be ready for submission for some time. The list of the new academic programs, by institution, appears in Attachment A.

Davidson's presentation to Governor Roemer's Task Force on Public Higher Education (September 30, 1988) indicates that " . . . , sadly, a number of programs provided in the Consent Decree were programmed at the outset for weakness or failure . . . ." (See Attachment A).

From September 18, 1981 forward, the Board of Regents, prior to approval of any new academic program at a predominantly white institution, assessed the impact of implementing the program on the achievement of other-race enrollment goals at predominantly black institutions. The Board developed a questionnaire to be completed by each predominantly white institution proposing an academic program and a set of questions to be answered by predominantly black institutions concerning each new academic program which a predominantly white institution proposed. The institutions' responses to these questionnaires were included in impact assessments prepared by the Board for each program proposed by a predominantly white institution and acted upon by the Board of Regents. From 1982 through the present, the Board has considered 130 proposals for new academic [3] programs from white institutions. Twelve were disapproved, and actions on 6 were deferred on the grounds of quality or need. Of the remainder, the Board disapproved 21 because they posed the risk of impairing other-race enrollment ar predominantly black institutions. Of the 86 programs approved at predominantly white institutions since 1982, 6 received approval only after the attachment of stipulations designed to encourage other-race enrollment at predominantly black institutions. Most recently, for example, the Board approved the M.S. in Systems Technology at Louisiana State University-Shreveport with the stipulation that all coursework would be offered at Barksdale Air Force Base and no class would begin before 4:30 p.m. The purpose of these restrictions was to prevent the new program from negatively

impacting on the Master of Business Administration (Computer Information Systems option) at Grambling State University.

The Board of Regents periodically reviews academic programs at institutions throughout the state to assess educational quality and need. Those programs not meeting the Regents' standard are subject to elimination. In recent years, the state's fiscal crisis has placed added pressure on the Board of Regents to eliminate duplicative programs or programs of inadequate quality and insufficient need. From 1982 through the present the Regents have reviewed 583 programs; 106 of these were located at predominantly black institutions. Of the 583 programs reviewed, 514 were maintained and strengthened, and 69 were terminated; 14 of the programs terminated were located at predominantly black institutions.

Not included in these totals are the "low completer" program reviews which the Board undertook during 1987 due to budgetary constraints. The Board reviewed 459 programs which had produced fewer than 5 graduates during the previous 5 [4] years. 293 of these were maintained and strengthened, while 166 programs were terminated. Among the "low completer" programs terminated, 41 were located at predominantly black institutions. In 36 of the 41 instances of termination, the predominantly black institutions concurred with action by the Regents.

In its reviews of existing programs at predominantly black institutions, the Board of Regents has considered whether elimination might disproportionately affect the institution. This consideration has persuaded the Board of Regents to refrain from terminating several programs at predominantly black institutions that might have been terminated if considerations of duplication, need, and quality alone had been determinative. For example, due to serious questions regarding both quality and need, separate teams of consultants recommended the termination of the architecture and engineering programs at Southern University-Baton Rouge. The Board of Regents, recognizing the importance of these programs to the enhancement of Southern University, voted to maintain and strengthen each program.

DIRECT TESTIMONY OF DOUGLAS REWERTS
[Without Attachments]

Douglas Rewerts, Assistant Commissioner for Facility Planning has been in charge of facilities and capital outlay matters for the Board of Regents since late 1979. Prior to this he was employed by the H. J. Wilson Co. as Corporate Architect in charge of store planning and construction. Prior to that he was in private practice as an architect. He has a Bachelor of Architecture degree and is licensed to practice architecture in the state of Louisiana.

[The Board of Regents submits that the following testimony is irrelevant to the issue of remedy and should not be admitted. If, however, any party is permitted to introduce testimony concerning the capital improvements at the predominantly black institutions during the period of the Consent Decree, or the alleged inequality of the physical plants at predominantly black and predominantly white institutions, the Board of Regents reserves the right to rebut such testimony. At a minimum the Regents would show as follows:

Under the Consent Decree the State of Louisiana undertook to improve existing facilities and construct new facilities at the predominantly black institutions such that their physical plants would be comparable to those of similar predominantly white institutions. In August 1982, in accordance with the Consent Decree, a panel of experts completed a study of the nature and extent of facilities deficiencies at the predominantly black institutions and identified capital outlay projects necessary to upgrade the physical plants of predominantly black institutions. The panel of experts recommended nearly $55 million in improvements for the predominantly black institutions. In October 1982, the Board of Regents adopted a Consent Decree Five-Year Capital Outlay Plan (1983-87), taking into account the recommendations of the Facilities Study. The Regents' plan recommended $95.5 million in improvements for the PBI's. The Regents' plan was updated in October of subsequent years through 1987. Adjustments to the plan for inflation and programmatic changes brought the total plan to $124,044,691 in October 1987. A total of $35,813,375 has been appropriated and funded by the state through December 1988. $15,905,000 is included in the bond section of the current capital outlay act (Act 769 of 1988) for Consent Decree

projects. This leaves $72,326,316 unappropriated and unfunded of the $124 million plan. A summary of Consent Decree Capital Outlay Funding is included as Attachment A.

As in the normal routine the Regents made capital outlay recommendation in October 1988. However, at that time the fate of public higher education was in a state of flux. At that time ideas submitted by the parties engaged in the negotiations indicated that the role, scope, and missions of many of our institutions could change. Role, scope and mission changes could have dramatic impacts on the physical plants of the institutions. [2] Given this fact and the extremely limited financial resources of the state, the Board decided to limit capital recommendations for 1989-90 to true emergencies, hazardous materials abatement projects, projects that will preserve the state's current investment in physical plant, and projects that will provide considerable savings in operating costs. None of the recommended projects should be impacted by changes in role, scope, and mission of the institutions. The recommendations are summarized as follows:

Emergency projects	$ 898,500
Hazardous Materials Abatement Projects	2,130,000
Roof Repairs/Replacements, Utility Improvements & Energy Conservation Projects	15,323,218
	$ 18,351,718

Action on all other requests for capital funding was deferred until a later date. A summary of the Board of Regents' 1989-90 Capital Outlay Recommendations is included as Attachment B. The Board has not adopted a five-year plan for 1989-93 for the same reasons that the 1989-90 recommendations were limited. The Board will reconsider its 1989-90 Capital Outlay Recommendations in late February 1989, so that any necessary revisions to the recommendations can be forwarded to the Division of Administration and Legislature prior to the next regular session of the Legislature scheduled to begin is mid-April.

A summary of state funds provided for capital outlay projects at all state institutions of higher learning from 1982 through 1987 together with the percentage of such funds received by the PBI's in included as attachment C.

A summary of the 1988 Capital Outlay Bill (Act 769 of 1988) is included as Attachment D.

On numerous occasions since the Consent Decree Capital Outlay Plan was adopted by the Regents, Grambling State University has contended that a $14-18 million Health, Physical Education, & Recreation building was a part of the Consent Decree Capital Outlay Plan. However, Grambling did not make this contention until after the second year the Regents had adopted the plan. That year the published recommendations of the Regents contained a typographical error in one of three places that the project appeared in the document. The H & PER project was inadvertently listed with an asterisk beside it in the regular five-year plan (The asterisk denoted CD projects). It should be noted that this project was never included in the Regents' Five Year Consent Decree Plans, nor was it recommended by the Facilities Study Panel. The project has been included in the [3] Regents regular Five-Year Capital Recommendations through the years.

On occasions since the Regents revised their capital outlay equipment guidelines in October 1987, Grambling has indicated that these guidelines were burdensome and confusing. The Regents revised the guidelines in an effort to clarify for the institutions what types of equipment would be allowed in capital outlay and to bring our guidelines in conformance with those guidelines already imposed by the Division of Administraion. The Regents' guidelines were basically the same as the DOA's, but included more specific information.

DIRECT TESTIMONY OF LARRY TREMBLAY
[Without Attachments]

Larry Tremblay is employed by the Board of Regents as Coordinator of Research and Data Analysis. He has held that position since 1976. In connection with his duties at the Board of Regents, Tremblay collects, stores, and works with data provided by various information services, including the Statewide Student Profile System (SSPS),[1] the Higher Education General Information Survey (HEGIS) (replaced by the Integrated Postsecondary Education System (IPEDS) in 1986)[2], and the American College Testing Program (ACT).

Some of that data, relating to black and white students enrolled at Louisiana's institutions of public higher education are reported below.

From 1976 to 1980 black enrollment at the PWI's increased from 15,069 to 16,536 (HEGIS). From 1980 to 1981 there was a further increase to 18,887 (HEGIS). From the time that the Consent Decree was entered in 1981 to the present, there have been steady declines in black enrollment at the PWI's, despite an upward trend in black enrollment as a whole.

In the fall of 1981, 32,899 (SSPS)/34,480 (HEGIS) black American students attended public institutions of higher education. Of these, 18,812 (SSPS)/18,887 (HEGIS), or 57.2% (SSPS)54.8% (HEGIS), were enrolled at predominantly white institutions.

In the fall of 1981, 97,961 (SSPS)/105,035 (HEGIS) white American students attended public institutions of higher education. Of these, 284 [2] (SSPS)/270 (HEGIS), or 0.3% (SSPS)/0.3% (HEGIS), were enrolled at predominantly black institutions.

Fall, 1981 enrollment figures, by race, for the individual institutions are reflected in Attachment A.

By fall, 1988 public institutions of higher education statewide reported enrollment of 34,521 (SSPS/34,753 (IPEDS) black students. Of these, 16,380 (SSPS)/16,624 (IPEDS), or 47.4 (SSPS)/47.8 (IPEDS) % were enrolled at predominantly white institutions.

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[1]SSPS data do not include the LSU Medical Center.

[2]HEGIS/IPEDS data do not identify Louisiana residents.

By fall, 1988 public institutions of higher education statewide reported enrollment of 99,749 (SSPS)/102,579 (IPEDS) white students. Of these, 1,181 (SSPS)/878 (IPEDS), or 1.2 (SSPS/0.9 (IPEDS) % were enrolled at predominantly black institutions.

Fall, 1988 enrollment figures, by race, for the individual institutions are reflected in Attachment A.

Information provided by Southern and Grambling shows the following enrollment, by race, in the new Consent Decree academic programs in 1988:

Southern University-Baton Rouge

Program(s)	Black	White	Other	Total
B.S. Rehab Counseling	22	0	1	23
Mast Public Admin	44	0	17	61
MA/MS Rehab Counseling	33	1	2	36
B.S.Environ Chemistry	5	0	0	5
B.S.Nursing	53	4	5	62
M.S. Computer Science	38	5	28	71
M.A./Ed.S./Ed.D./Ph.D. Special Education*	146	11	5	162
[3] Mast Prof Accountancy	10	0	5	15
Total	**351**	**21**	**63**	**435**
Percent of Total	80.69%	4.83%	14.48%	

Southern University-New Orleans

Program(s)	Black	White	Other	Total
B.S. Transportation	4	2	2	8
B.S. Print Journalism	13	0	1	14
AS Computer Science	42	0	0	42
BS Technology	7	2	0	9
BS Substance Abuse	30	24	2	56
BS Criminal Justice	56	1	0	57
Mast Social Work	63	34	5	102
BS Urban Studies	6	0	0	6
Total	**221**	**63**	**10**	**294**
Percent of Total	75.17%	21.43%	3.4%	

*M.A./Ed.S Joint Degree Program with LSU-BR

Grambling State University

Program(s)	Black	White	Other	Total
MAT Social Sciences	5	0	1	6
Mast Bus Admin	18	0	13	31
Mast/EdS/EdD Develop Educ	60	14	4	78
BS Nursing	300	57	3	360
MAT Natural Sciences	16	0	1	17
Mast Liberal Studies	21	0	2	23
Mast Public Admin	16	0	4	20
Mast Social Work	46	19	1	66
Ms Crim Justice	32	12	4	48
Total	**514**	**102**	**33**	**649**
Percent of Total	79.20%	15.72%	5.08%	

[4] Southern University-Shreveport*

Program(s)	Black	White	Other	Total
AS Early Childhd Educ	0	0	0	0
AA Day Care Admin	8	0	0	8
AS Small Bus Admin	0	0	0	0
AS Surgical Tech	0	0	0	0
Cert Nurse's Ass't	105	8	0	113
AA Legal Ass't	0	0	0	0
AA Mental Health/Retard	0	0	0	0
AS Computer Sci	59	9	0	68
AAS Banking & Fin	0	0	0	0
AAS Electronics Tech	39	3	0	42
AAS Radiologic Tech	0	0	0	0
AS Hotel/Motel Mgt	0	0	0	0
AA Tourism/Travel Mgt	0	0	0	0
AAS Medical Rec Tech	24	5	1	30
AAS Respiratory Ther	0	0	0	0
Total	**235**	**25**	**1**	**261**
Percent of Total	90.04%	9.58%	0.38%	

Source: UGGRCIPD

*The data submitted by Southern University-Shreveport appear incomplete, and therefore, suspect.

Louisiana's open admissions policy results in the enrollment of thousands of underprepared students at Louisiana's public colleges and universities. In 1987 the composite score on the ACT Assessment for Louisiana high school students was higher than for freshmen entering public higher education, apparently because many students scoring higher than average on the ACT leave the state.

A test taker receives a score of one (1) for signing the answer sheet. ACT representatives have commented that random completion of the answer sheet without reference to the questions will yield a score of 6-7. In [5] fall, 1987, seven students enrolled in Louisiana public higher education with a score of 2; 2,106 scored 8 or less on the ACT Assessment. An ACT composite score of 8 was in the 8th percentile in Louisiana, but only the 3rd percentile nationally.

In 1987-88, the mean ACT score of Grambling's freshman class was 11.0, with 81% of the class scoring 15 or below. At proximate Louisiana Tech, the mean score was 18.3, with 65% of the class scoring 16 or higher. In the freshman class at Southern University-Baton Rouge, the mean ACT score was 11.3 with 79% scoring 15 or below. At proximate Louisiana State University-Baton Rouge, the mean score was 19.6 with 80% of the class scoring 15 or above. At Southern University-New Orleans, the mean score was 9.7 and over 90% of the class scored at 15 or below. At proximate University of New Orleans, the mean score was 16.4 and over 50% of the class scored 16 or higher. Table 1.1 of the ACT Class Profile from each institution for 1987-88 are included in Attachment B. In addition, more detailed ACT information concerning reported ACT scores and high school G.P.A. for entering 1987 freshman at Louisiana's 4-year colleges appears in Attachment B.

There has been considerable debate about the use of ACT scores as a measure of a student's ability or likelihood of success in higher education. Most students entering institutions of public higher education in Louisiana are required to take the ACT Assessment. Regardless of the pros and cons expressed nationwide of using the ACT as predictor, there has been a strong correlation between performance on the ACT and attrition in the population studied in the Consent Decree attrition study (the [6] firsttime freshman class of 1982). In the study

population, the attrition* rates by ACT interval through spring, 1988, were as follows:

ACT 1-5	81%
ACT 6-10	75%
ACT 11-15	63%
ACT 16-20	50%
ACT 21-25	38%
ACT 26-36	28%

Attrition rates and graduation rates for the fall, 1982 firsttime freshman class through the spring of 1988 appear in Attachment C.

Although none of Louisiana's public institutions place students in developmental education based solely on performance on the ACT, it is commonly used as a "flagging" mechanism to identify students for further testing and evaluation. The participation, by race, of 1988 fall firsttime freshmen in developmental education at the state's proximate institutions of public higher education is as follows:

*Attrition was defined as not being enrolled in Louisiana public higher education for three or more consecutive terms.

	BLACK		WHITE		OTHER		TOTAL	
	#	%	#	%	#	%	#	%
Grambling	1,042	75.7	4	100.0	12	100.0	1,058	76.0
Tech	140	49.3	425	28.2	6	28.6	571	31.5
LSU	144	43.8	650	20.7	22	10.5	816	22.2
SUBR	1,503	77.3	2	13.3	17	56.7	1,522	76.5
SUNO	291	89.8	3	7.0	2	9.5	296	76.3
UNO	508	88.5	915	54.4	110	50.2	1,533	62.0

ADMINISTRATIVE PROCEEDINGS IN THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; LAW ENFORCEMENT ASSISTANCE ADMINISTRATION; GENERAL SERVICES ADMINISTRATION; NATIONAL SCIENCE FOUNDATION; THE VETERANS ADMINISTRATION; DEPARTMENT OF AGRICULTURE; DEPARTMENT OF INTERIOR; DEPARTMENT OF COMMERCE; DEPARTMENT OF STATE; DEPARTMENT OF LABOR;

ACTION AND ADMINISTRATIVE PROCEEDING IN THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In the Matter of the STATE OF NORTH CAROLINA and THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, et al.,

Respondents.

HEW Docket No. 79-VI-1
HUD Docket No. 79-4

LL Hearing Room 1
Gelman Building
2120 L Street, N.W.
Washington, D. C.

Wednesday, 13 August 1980
9:30 a.m.

BEFORE:

HON. JOHN J. MATHIAS
Administrative Law Judge

APPEARANCES:

On Behalf of the Government:

RICHARD L. FOSTER, Esq.
JEFFREY F. CHAMPAGNE, Esq.
ARTHUR LEED, Esq.

* * *

[HEARING TESTIMONY OF HAROLD HOWE, II]

[2787] JUDGE MATHIAS: Please come to order.

BY MR. LEVIN:

Q. Mr. Howe, in an affidavit filed on June 5, 1979, in connection with — I should correct myself, to say an affidavit dated June 5, 1979, and filed in the case of the State of North Carolina versus the Department of Health, [2788] Education, and Welfare, Peter Libassi stated that he relied on a blue-ribbon panel of experts on higher education to assist the Department in drafting the criteria and the panel provided comments and criticisms which influenced the final product.

And attached to that affidavit was a list of the people in attendance at that panel, and your name heads the list as Harold Howe, vice-president of the Ford Foundation.

Do you have any recollection of that panel meeting?

A. As I testified in the course of my deposition, I did not at that time have any recollection at all of that. And since this kind of record was clear, I agreed to see what I could do to encourage my memory and to look into any facts I had about it.

I subsequently wrote either you or Richard Foster or both to the effect that I had found on my calendar a meeting in HEW and the date of record is in that letter. It was in January of '77, if I recall correctly, but you do have the record of it somewhere.

So I said that I apparently had been at a meeting of that group and apparently that was it, but I could not recall any details of the meeting. It did not make a great impression on me, quite clearly.

And I looked through the files in my office and can find no formal invitation to be a member of that panel. I am [2789] frequently in the role of meeting with groups connected to the government about some subject or other. This happens all the time.

And so it doesn't surprise me that I forgot the affair, but I regret that I did, and I can't give you much more report than that about it.

Q. And you presently have no independent recollection what transpired at that meeting?

A. As I think I said to you in my letter, I vaguely remember that Mary Berry was there, and — but I really don't have any solid recollection that would be useful.

Q. Do you have any recollection of Secretary Califano during the course of that meeting attacking the traditional black colleges?

A. No, sir, I don't.

Q. You recently had a conversation, did you not, with Secretary Califano, in which he thanked you for participating in that panel?

A. Well, we weren't discussing that at all, and he made that a kind of a side remark. We were discussing the way by which the President of the United States was elected, if there was a way to improve upon it.

Q. Did you come to any conclusions?

(Laughter.)

A. I don't think that is particularly relevant to this.

Q. No, sir, but it is very interesting.

A. And then Joe - and I think maybe Joe was being supercilious, because he had heard I had forgotten the meeting.

In any event, he did say, "You did a great job for me, Doc, on that blue ribbon panel," as he got in the elevator. And that's all I can tell you; I made no response.

Q. During your tenure as United States Commissioner for Education, as I understand it, you had no significant involvement at that time in higher education desegregation issues; is that correct?

A. Yes, I think that's correct.

* * * *

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY

TO: Peter Libassi DATE: April 11, 1977

FROM: Richard Cotton

SUBJECT: Prestigious Consultants in *Adams*

I attach a list of proposed consultants to be asked to join in one or two meetings to analyze the issues and the proposed criteria in *Adams*.

The names placed parallel to each other are either/or alternatives with the first name of the preferred person.

Incidentally, if we meet with these people once or twice, can we avoid the Federal Advisory Committee Act?

Attachment

[2] Harold Howe
Vice President
Education and Research
Division
The Ford Foundation
320 43rd Street
New York, New York 10017
212/573-4677

*Frances Keppel
Director
Program on Education
Aspen Institute for
Humanistic Studies
6 Appian Way
Room 433
Gutman Library
Cambridge, Massachusetts 02138
617/495-4677

Elias Blake
President
Institute for Services to Education
2001 S Street, N. W.
Washington, D.C. 20009
797-3500

Norman C. Francis
President
Xavier University of Louisiana
7325 Palmetto Street
New Orleans, Louisiana 70125
504/486-7411 x. 221

Marian Edelman
Children's Research Project
Albany, New York

Clark Kerr
Carnegie Council on Policy
Studies on Higher Education
2150 Shattuck Avenue
Berkeley, California 94704
415/849-4474

Andrew Billingsley
President
Morgan State University
Colvspring Lane-Hillin Road
Baltimore, Maryland 21239
301/893-3200

Ralph Hewitt
Executive Director
National Association of State
Universities and Land-Grant
Colleges
No. 1 Dupont Circle, N.W.
Washington, D.C. 20036
293-7120

*Walter Leonard
Special Assistant to the
President
Harvard University
Massachusetts Hall
Cambridge, Massachusetts 02138
617/495-1531

*Alan Ostar
American Association of State
Colleges and Universities
No. 1 Dupont Circle, N.W.
Suite 700
Washington, D.C. 20036
293-7070

*Alternate

TRANSCRIPT OF PROCEEDINGS

ADMINISTRATIVE PROCEEDING IN THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; LAW ENFORCEMENT ASSISTANCE ADMINISTRATION; GENERAL SERVICES ADMINISTRATION; NATIONAL SCIENCE FOUNDATION; THE VETERAN'S ADMINISTRATION; DEPARTMENT OF AGRICULTURE; DEPARTMENT OF INTERIOR; DEPARTMENT OF COMMERCE; DEPARTMENT OF STATE; DEPARTMENT OF LABOR; ACTION AND ADMINISTRATIVE PROCEEDING IN THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In the Matter of the STATE OF NORTH CAROLINA and THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, et al.,

Respondents.

HEW Docket No. 79-VI-1

HUD Docket No. 79-4

DEPOSITION OF SHELDON ELLIOT STEINBACH

5th Floor Conference Room
330 C Street, S.W.
Washington, D.C.
June 5, 1980
10:00 a.m.

[2] APPEARANCES:

On Behalf of the Respondents:
J. RICHARD COHEN, Esquire
Charles Morgan, Jr.
& Associates, Chartered
1899 L Street, N.W.
Washington, D.C. 20036

On Behalf of the Government:
JEFFREY CHAMPAGNE, Esquire
330 C Street, S.W.
Washington, D.C.

* * *

[3] DIRECT EXAMINATION
BY MR. CHAMPAGNE

* * *

[8] Q. As you mentioned before, there was a body now known as the Blue Ribbon Panel. Was it, when you were active in it, known as the Blue Ribbon Panel at that time?

A. No.

Q. When were you asked to participate in this group?

A. I was asked to participate by Roger Hynes to [9] whom the initial, the former president of the American Council on Education, now president of the Hewlitt Foundation in Palo Alto, California. He would have I think under any circumstances turned it over to me, but he was departing his office at the ACE at the time and he turned over the letter invitation to me with a buck notice as to whether I wanted to attend or not. And I said surely, I would be happy to attend.

Q. Do you recall from whom the letter came?

A. I have not — my recol — I do not recall directly. I think it may have been signed by the Secretary.

Q. Do you recall from either the letter or from your understanding of the purpose of the group as it convened or what the purpose was?

A. My recollection was that the purpose of the meeting, as I recall the invitation, obviously, I have looked through my files and I do not have a copy, was to bring together a group of people to discuss in a general way the issues involving desegregation of higher education.

Q. Was it known to you through the letter or in any other way that it related to the Adams case?

A. No, I don't — no. To the best of my [10] there was no mention of that in the invitation letter nor was that ever brought about or mentioned during the course of a meeting.

Q. Aside from what was mentioned, did you know that to be the case?

A. No, I did not.

Q. So was it your impression that there was an attempt to bring together a homogeneous group or diverse or how would you characterize it?

A. Of the people that I knew there, my feeling was that there was an attempt to bring about a reasonably diverse group of individuals.

Q. Do you think that attempt was successful?

A. No, not particularly. There seemed to be, Mr. Champagne, a uniformity of views expressed by people with expertise and a self-interest in predominantly black institutions of higher education. The white members of that panel from the best of my recollection were remarkably quiet during most of the discussion that afternoon.

Q. Let me paraphrase what you said and you can tell me whether it is accurate. Putting those two things together, there was something of a unanimity but only among those who spoke?

[11] A. There were some, as I recall, some diversity but there was — yes, a general unanimity of views from the black members of that committee.

Q. And can you remember any of the ideas or factors about which they were unanimous?

A. There seemed to be general agreement and a majority of the time spent once Mr. Califano walked into the room, after he made his presence, which was a half an hour or so after the meeting began, make it a little longer, was with the benefits to black community in general in preserving the traditional black institutions of higher — public black institutions of higher education.

Q. Are you saying that that was the gist of the comments to the Secretary or —

A. Yes.

Q. — from the Secretary?

A. No. To the Secretary.

Q. To the Secretary. And what was the view — did you feel you were representing the American Council on Education at that meeting or essentially —

A. No, I did not at any time feel that at all. I felt that this was an individual invitation and they were – I was there solely as an individual.

[12] Q. And what view did you express?

A. To the best of my recollection Mr. Champagne, I did not say a thing the entire afternoon.

Q. Was that because you didn't have a view or perhaps because you felt inhibited? Why was that?

A. I did not state anything for a variety of reasons. Primarily, I do not have or did not have any expertise in the issues that these gentlemen were addressing, number one. My interest in the area as a matter of record in the *amicus* brief we filed in the Fourth Circuit, Mandel versus HEW, were solely on the procedural issues involved which were never addressed that afternoon.

Q. What are some of the procedurals you wish had been addressed?

A. The issue of the formulation of guidelines for desegregation in higher education which had not then been promulgated was never raised as an issue. The other issue for which our organization was very concerned was simply the attempts by HEW in the Maryland situation to cut off federal funding before any final judicial determination had been made as to the legitimacy of the claim that had been made.

Even in the Maryland case, for example, we [13] clearly stated we took no position with regards to the merits of the claim of HEW but we were solely in on the procedural issues.

Q. Without trying to bind you or your organization, do you currently know whether your organization or yourself have any position on the merits of the current dispute between the federal government and the state of North Carolina?

A. None. I do not. I don't – and our organization has had no reason or occasion to undertake a position.

Q. Could you describe, you have described part of the session of the panel, the one theme that was brought out to the Secretary. Could you describe the rest of the day and tell me –

A. Well, to be –

Q. – how long the session was, whether there were any –

A. My recollection it started at 2 o'clock, around 2 o'clock; ended at about 4:30, 4:45, possibly a little earlier, 4:15.

The early part of the session I cannot quite recall. I do recall rather vividly the discussion for about a half hour after the Secretary arrived [14] simply because 1) it was the first time I had occasion to meet the Secretary, and 2) I was somewhat surprised by his opening statement in which he deplored the poor board scores, college board scores, college submission scores then that were at the predominantly black institutions and that started a substantial conversation as to the validity of board scores that went on for well over half an hour, I would imagine.

Q. You are referring now to the SAT scores of entering freshmen?

A. Correct.

Q. And what else was discussed?

A. Following that there was, as I said, a substantial discussion of the merits and value to the black community of maintaining these institutions. There then followed a reasonably lengthy discussion of the inequality of allocation of resources to the black institutions. That took up a major portion of the time. And there was some discussion, as I recally [sic], of the issue of how does one get sufficiently qualified, academically qualified, black students ready so that they can 1) meet higher academic qualifications at the Chapel Hill campus at the University of North Carolina and the – and then a reasonable discussion about the sociological factors involved in how high [15] school students, graduated high school students, goes [sic] out picking their colleges; a lively discussion of how one, for example, might – is difficult to create the incentives for some students to go to places where the – for other reasons they may feel more comfortable one place or another, simply relating to the problem of getting a substantial number of black high school graduate students to apply to more traditionally white institutions when their colleagues and neighbors, friends, may have in the past gone to the more traditionally black institutions and just a matter of comfort and what have you may have gone there.

That seemed to take up a good portion of the time. With a black sociologist present, whose name I can't recall, we spoke quite a bit about that and some other subjects which I can no longer recall.

Q. You mentioned the University of North Caroline [sic] a moment ago. Was North Carolina mentioned specifically during that discussion?

A. Yes.

Q. Were other states mentioned?

A. Not to my knowledge. Even though President Shannon, former President Shannon of the University of Virginia was sitting in that room, I don't believe at [16] any time did the conversation deviate from a concentration of North Caroline [sic]. I think part of that may have been brought about by the Secretary's initial discussion stating figures, the SAT freshman figures for North Caroline [sic] institution as an example.

Q. I see.

A. That they in fact focused things on North Carolina even though one of the states have had problems too.

Q. A previous deponent recalled that hypothetical or options addressing different notions of what became the criteria were presented to some people that the government consulted with and possibly to this panel. Do you recall whether they were presented to this panel?

A. Mr Champagne, I have no recollection. There was certainly no written material passed out. To the best of my knowledge there was no agenda placed before us and from the tone of the invitational letter, as I recall it, and for what actually occurred, it was a far-reaching discussion of a variety of things which happened to come to people's minds.

* * * *